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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. 581

GEORGE J. ADAMS AND A. W. KITCHEN, COPARTNERS TRADING AS ADAMS & KITCHEN, ET AL.,
Petitioners,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AND UNION STOCK YARD & TRANSIT COMPANY,
Respondents.

PETITIONERS' REPLY TO BRIEF OF RESPONDENT DIRECTOR GENERAL OF RAILROADS ON THE MERITS.

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STATEMENT.

Counsel for respondent Director General of Railroads start their brief with the statement, "petitioners' statement of facts omits many essential facts and is, in some respects, misleading and erroneous," and then, making no attempt to point out such alleged omissions, misleading or erroneous facts, proceed with a highly partisan and colored

statement of interwoven alleged facts, argument and contentions.

Respondent's statement of facts merely reiterates the salient facts set forth in petitioners' brief, coloring the same by reference to portions of the reversed and discarded report of the Commission of February 11, 1919, and by voluminous quotations from carefully selected portions of the testimony of a few of more than one hundred witnesses who testified before the Commission. The statement is studiously arranged to furnish the basis of the argument which follows.

In the preparation of respondent's argument counsel ignore the usual practice of following the subdivisions of petitioners' brief and replying to the points therein contained. Instead of so doing, they set up their independent subdivisions and points and devote their argument to such points, not attempting to follow or answer the points and arguments in petitioners' brief. This departure from the usual practice obviously tends to detract from the force and effect of the vital and controlling points made in petitioners' brief on the merits and to divert attention from such points.

SUMMARY OF ARGUMENT.

I.

PETITIONERS HAVE NO MISCONCEPTION OF THE FACTS.

A. THE PUBLISHED TARIFFS OF THE LINE-HAUL CARRIERS COVERED TRANSPORTATION TO THE STOCK YARDS, INCLUDING THE UNLOADING THEREOF.

It is urged by respondent Director General of Railroads that we are in error in stating that the line-haul rate, plus the $2.00 terminal charge, included the unloading of live stock at the Stock Yards in Chicago. The basis of our contention is the precise, definite and conclusive finding of the Commission on this subject, fortified by the uncontradicted testimony (a part of which we have referred to at pages 44 to 47 of our brief on the merits). The finding of the Commission is (R. 144) "the line-haul rates to Chicago, plus a charge of $2.00 for terminal or switching service, have for years constituted the through charge and included the delivery of live stock to the consignee at the Stock Yards." Respondent Director General of Railroads challenges the correctness of this finding. We accept the challenge and leave it to this Honorable Court to determine whether the finding of fact of the Commission on this vital and controlling proposition in the case is to be accepted, as we contend it should be, or ignored, as counsel for the Director General contend it should be.

B. THE YARD COMPANY, NOTWITHSTANDING THE FACT THAT IT WAS A COMMON CARRIER, WAS IN FACT THE AGENT OF THE LINE-HAUL CARRIERS IN PERFORMING A PART OF THE THROUGH TRANSPORTATION SERVICE WHICH THE LINE-HAUL CARRIERS IN THEIR PUBLISHED TARIFFS HELD THEMSELVES OUT TO PERFORM.

That the Yard Company was a common carrier and required to file and maintain its tariffs is not disputed. Nevertheless, under the disputed evidence in this case, in the performing of the loading and unloading service at the Union Stock Yards it was, in fact and in law, acting as the agent or instrumentality of the line-haul carriers, and in its published tariffs its charges were expressly limited to its charges as agent for the line-haul carriers. The statement of respondent Director General that the alleged agency was repudiated and did not exist is not supported by the record. The statement of respondent that the Commission found that the alleged agency was repudiated and did not exist (citing R. 137) is also without foundation, inasmuch as the Commission made no such finding (R. 137).

C. A MATTER OF ADMINISTRATIVE DISCRETION WAS INVOLVED IN THE DECISION OF THE INTERSTATE COMMERCE COMMISSION WITH REFERENCE TO THE QUESTION AS TO WHETHER OR NOT IT WAS THE DUTY OF THE LINE-HAUL CARRIERS TO LOAD AND UNLOAD LIVE STOCK AT THE UNION STOCK YARDS IN CHICAGO, OR TO PAY ITS AGENCY OR INSTRUMENTALITY FOR THE PERFORMANCE OF THAT SERVICE.

This point is fully discussed under Subdivision III of petitioners' brief on the merits, pages 30 to 38. The question of whether or not it was the duty of the line-haul carriers to unload live stock at the Union Stock Yards was a question of fact to be determined according to actual conditions and operations at that point. No rate for the transportation of live stock could be intelligently considered or approved or disproved by the Commission unless it was

first determined by the Commission whether the obligation to unload live stock at the Union Stock Yards was on the shipper or on the line-haul carrier. The question as to whose duty it was to unload live stock at the Union Stock Yards was inextricably and inseparably bound up with the determination of the merits of the case. The question involved was not merely the construction of the published tariffs of the Stock Yard Company and the line-haul carriers, but involved the determination of many questions of fact. The Circuit Court of Appeals should have accepted the determination of the Commission on this subject.

II.

THE EVIDENCE WAS SUFFICIENT TO SHOW THE DUTY OF LOADING AND UNLOADING LIVE STOCK AT THE STOCK YARDS WAS THAT OF THE LINE-HAUL CARRIERS; THEREFORE, THE LINE-HAUL CARRIERS IN THEIR PUBLISHED TARIFFS WERE COMPELLED TO MAKE FULL AND COMPLETE PROVISION FOR THAT PORTION OF THE TRANSPORTATION SERVICE.

This question is fully discussed at pages 41 to 44 of petitioners' brief on the merits.

The contention that the Yard Company, in performing the unloading service, occupied the position of an independent common carrier, is anticipated and refuted at pages 63 and 64 under subdivision V, pages 59 to 64, of petitioners' brief on the merits.

The attempt of counsel to confuse the issue by quoting from the finding by the Commission in its first report (R. 138), which was afterwards on rehearing reversed and discarded (R. 144), should not be permitted to mislead the court as to what the ultimate findings of the Commission on this question actually were. Under this subdivision counsel

for respondent Director General of Railroads attempt to persuade the court to weigh and consider the testimony taken before the Commission with reference to the duty of loading and unloading live stock at the Union Stock Yards. This the court may not do. The only instances in which the courts will review findings of fact by the Commission are where the Commission has acted arbitrarily or without evidence to support its conclusion, or has transcended its constitutional or statutory powers. (*Standard Oil Co.* v. *United States*, 283 U. S. 235; *Interstate Commerce Commission* v. *Delaware, L. & W. Ry. Co.*, 220 U. S. 235; *United States* v. *Louisville & N. R. R. Co.*, 235 U. S. 314; *Procter & Gamble* v. *United States*, 225 U. S. 282, at pages 296 to 298.

III.

THE FINDING OF THE COMMISSION THAT THE STOCK YARDS WERE THE TERMINALS OF THE LINE-HAUL CARRIERS WAS SUPPORTED BY AMPLE EVIDENCE. SUCH FINDING RESTED ENTIRELY ON THE DETERMINATION OF THE FACTS AND SHOULD BE ACCEPTED BY THIS COURT.

It is not contended that there was no evidence before the Commission to support this express finding of the Commission, or that the Commission transcended its constitutional or statutory powers. For the same reasons and under the same authorities referred to under the preceding section of this Summary of Argument that finding is not subject to review by this court.

IV.

WHILE THE STOCK YARD COMPANY WAS A COMMON CARRIER SUBJECT TO THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION AND BOUND TO OBSERVE THE PROVISIONS OF ITS PUBLISHED TARIFFS, IT HAD NO RIGHT TO EXACT FROM THE SHIPPER CHARGES FOR UNLOADING LIVE STOCK WHEN ITS PUBLISHED TARIFFS CONTEMPLATED THE COLLECTION OF SUCH CHARGES FROM THE LINE-HAUL CARRIERS.

We concede that the loading and unloading of live stock is a transportation service for which the carrier performing the service is entitled to compensation, but we contend that the collection of such charges for such service must be as specified in the published tariffs then on file.

This question is fully discussed at pages 41 to 44 of petitioners' brief on the merits.

V.

IT IS WHOLLY IMMATERIAL WHETHER THE INCREASED CHARGE OF 25 CENTS PER CAR WAS COLLECTED FROM THE SHIPPER BY THE YARD COMPANY.

In this connection counsel for respondent Director General of Railroads misrepresent the facts with reference to the allegation of plaintiffs' petition and the findings of the Commission.

However, as we pointed out in petitioners' brief on the merits (pp. 20, 26, 27, 28, 29), it is wholly immaterial whether the Stock Yard Company collected and retained said unlawful charges, because the Stock Yard Company and the line-haul carriers, by resorting to the unlawful practice set forth in detail at pages 8 and 9 of petitioners'

brief on the merits, became and were joint tort feasors and jointly and severally liable to make reparation regardless of which of them actually made the collection, and regardless of which of them actually received the benefit therefrom. Counsel for respondent have carefully evaded being drawn into a discussion of the proposition that the line-haul carriers and the Stock Yard Company, by joining in the practice resorted to by them to exact from the shipper the extra 25 cents per car in dispute, were joint tort feasors and jointly and severally liable to make reparation regardless of which of them actaully collected the unlawful charges and regardless of which of them ultimately received the benefit therefrom.

VI.

WHILE THE MAKING AND COLLECTING OF A SEPARATE CHARGE IS IN AND OF ITSELF ALONE NOT AN UNLAWFUL OR UNREASONABLE PRACTICE,—UNDER THE PARTICULAR FACTS AND CIRCUMSTANCES IN THIS CASE THE EXACTION FROM THE SHIPPER OF THE THROUGH TRANSPORTATION CHARGES, INCLUDING THE UNLOADING SERVICE, AS SPECIFIED IN THE PUBLISHED TARIFFS OF THE LINE-HAUL CARRIERS, COUPLED WITH THE FURTHER EXACTION OF AN ADDITIONAL CHARGE OF 25 CENTS PER CAR FOR THE IDENTICAL SERVICE ALREADY COVERED BY THE THROUGH RATES AND CHARGES OF THE LINE-HAUL CARRIERS, WAS BOTH UNREASONABLE AND UNLAWFUL. THE FINDING OF THE COMMISSION IN THIS REGARD IS SUPPORTED BY AMPLE EVIDENCE AND SHOULD BE ACCEPTED BY THIS COURT.

VII.

WHETHER THE PURPOSE OF THE YARD COMPANY IN INSERTING IN PARENTHESIS IN ITS PUBLISHED TARIFFS THE WORDS "AS A CARRIER'S AGENT" WAS TO FORCE THE LINE-HAUL CARRIERS TO PAY THE INCREASED CHARGE OF 25 CENTS PER CAR IS WHOLLY IMMATERIAL. WHATEVER ITS OBJECT AND PURPOSE WAS, IT MUST BE CONSIDERED AND GIVEN THE FORCE AND EFFECT OF LIMITING THE COLLECTION OF THE CHARGES THEREIN CONTAINED AGAINST THE LINE-HAUL CARRIERS.

The effect of the published tariffs of the Stock Yard Company is discussed at some length in petitioners' brief on the merits, pages 63 to 70. Counsel for respondent have significantly refrained from attempting to answer this important part of petitioners' brief. Counsel for respondent have in this connection again found it convenient to misrepresent the finding of the Commission with reference to the question of whether the Stock Yard Company, in performing the loading and unloading service, was acting as the agent or instrumentality of the line-haul carriers. On page 35 they say:

> "The Yards Company was not their agent, and the Commission so found (R. 137)."

Reference to the page of the record cited shows that the Commission made no such finding.

VIII.

THE CONTENTION THAT CONGRESS DID NOT CONSENT THAT THE AGENT APPOINTED BY THE PRESIDENT MIGHT BE PROCEEDED AGAINST BEFORE THE INTERSTATE COMMERCE COMMISSION FOR A TORT COMMITTED BY THE COLLECTION OR ENFORCEMENT, BY OR THROUGH THE PRESIDENT DURING THE PERIOD OF FEDERAL CONTROL, OF RATES, FARES, CHARGES, REGULATIONS AND PRACTICES, IS A NEW POINT NOT NOTICED BY THE DISTRICT COURT OR BY THE CIRCUIT COURT OF APPEALS AND IS WHOLLY UNTENABLE.

This contention is completely refuted by this court in *Missouri Pacific R. R. Co.* v. *Ault,* 256 U. S. 554, where it was held that the plain purpose of the provisions of the Federal Control Act was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President, and that the courts were to go on entertaining suits and entertaining judgments under existing law, except that the property in the hands of the President for war purposes was not to be disturbed; that subject to that exception the substantial legal rights of persons having dealings with the carriers were not to be affected by the change of control.

IX.

THE ABSORPTION CLAUSE IN THE PUBLISHED TARIFFS OF THE LINE-HAUL CARRIERS WAS NOT CONCLUSIVE ON THE QUESTION OF THE EXTENT OF THE DUTY OF THE LINE-HAUL CARRIERS TO PAY THE CHARGES OF THE STOCK YARD COMPANY FOR THE UNLOADING SERVICE.

In petitioners' brief on the merits (pp. 54 to 59, inclusive), we point out at some length the reasons why the so-called absorption clause in the published tariffs of the

line-haul carriers cannot be held to limit the obligation of the line-haul carriers with reference to the unloading service to the precise number of cents mentioned therein. Significantly, counsel for respondent have not attempted to answer any of these arguments, nor have they attempted to answer the contention made (pp. 55 and 56 of petitioners' brief on the merits) to the effect that in every case in which the initial carrier in its published tariffs provides that it will absorb or assume terminal charges, switching charges of connecting lines, and the like, the effect thereof is to establish a joint rate, and that such rate must be observed and adhered to by the line-haul carrier until it shall have amended its published tariffs containing such absorption clause in the manner required by paragraph 3 of Section 6 of the Act to Regulate Commerce.

X.

THE POINT MADE THAT THE DISTRICT COURT WAS CORRECT IN HOLDING THAT PETITIONERS HAD NO RIGHT TO MAINTAIN THIS ACTION HAS ALREADY BEEN ANSWERED BY THE BRIEF HERETOFORE FILED IN THIS CAUSE FOR THE INTERSTATE COMMERCE COMMISSION AS AMICUS CURIAE AND BY PETITIONERS' BRIEF ON THE MERITS, SUBDIVISION VII, PAGES 75 TO 96.

XI.

QUESTIONS OF PUBLIC IMPORTANCE SUFFICIENT TO JUSTIFY THE GRANTING OF A WRIT OF CERTIORARI ARE PRESENTED BY THE RECORD IN THIS CASE. WHILE THIS COURT MAY DISMISS A SUIT IN WHICH IT HAS IMPROVIDENTLY GRANTED A PETITION FOR CERTIORARI, THIS IS NOT SUCH A CASE.

ARGUMENT.

I.

IT IS RESPONDENT'S NOT PETITIONERS' CONTENTIONS WHICH ARE LARGELY BASED ON FUNDAMENTAL MISCONCEPTIONS OF THE TRUE FACTS IN THE CASE.

Subdivision I of the respondent's brief squarely raises an issue of fact as to the following propositions:

(a) Whether or not the published tariffs of the line-haul carriers covered the complete transportation of live stock from the point of origin to the Stock Yards, including the unloading at the Yards, in consideration of the line-haul rates plus the $2.00 terminal charge.

(b) Whether or not the Yard Company, in the performing of the unloading service, acted as agent for the line-haul carriers, and whether or not the charges enumerated in its published tariffs of May 21, 1917, (I. C. C. No. 2) applied to the charges which it made in that capacity to the line-haul carriers for loading and unloading live stock for the line-haul carriers at Union Stock Yards, Illinois, or whether the application of said charges was directed against the shipper.

(c) Whether or not the determination by the Commission of the questions involved in this case involved the exercise of administrative functions on the part of the Commission, in particular the question of whether or not, under the particular facts and circumstances existing at Union Stock Yards, Illinois, and the usages and customs existing at said terminal station, it was the duty of the line-haul carriers to load and unload live stock at that terminal point.

Fundamental Difference Between Contentions of Petitioners and Respondent.

A fundamental difference between the contentions of petitioners and the contention of respondent Director General is this: Respondent contends that the Yard Company, in performing the loading and unloading service in question, was acting in a separate and distinct capacity from that of the line-haul carriers and performed a distinct and separate service from the service which the line-haul carriers in their published tariffs held themselves out to perform; that the situation in this case is exactly the same as in the case of an initial common carrier and a connecting common carrier where no through rate has been established and where the initial carrier and the connecting carrier each publish their separate tariffs, restricted to the services respectively performed by each. On the other hand, petitioners contend that it was the duty of the line-haul carriers, by virtue of paragraphs 3 and 4 of Section 1 of the Act to Regulate Commerce, to completely cover in their published tariffs complete rates and charges for every service incident to the transportation of live stock, covering all "instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof;" that the line-haul carriers in the instant case, recognizing such to be their duty, and in their published tariffs established a through line-haul or commodity charge on live stock consigned to Union Stock Yards, Illinois, and in such through line-haul rates, plus $2.00 per car terminal charge, included reimbursement to themselves for the expense incurred in the loading and unloading of live stock incidental to such shipments.

The contention of respondent is sustained by no authorities cited. Our contention is sustained by the spirit and letter of paragraphs 3 and 4 of Section 1 of the Act to Reg-

ulate Commerce and by what this court has said with reference to the interpretation of said paragraphs.

In *Cleveland & St. Louis Ry.* v. *Dettlebach*, 239 U. S. 588, this court, after referring to paragraph 3 of Section 1 of the Act to Regulate Commerce, says, at page 594:

> "From this and other provisions of the Hepburn Act it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as interstate carriers by rail were concerned the entire body of such services should be included together under the single term 'transportation' and subjected to the provisions of the Act respecting reasonable rates and the like."

The same language is used by this court in *Erie Railroad Co.* v. *Shuart*, 250 U. S. 465, at pages 467 and 468.

As we have heretofore pointed out in petitioners' brief on the merits (pp. 44 to 51), the line-haul carriers treated the loading and unloading service as a part of the general transportation undertaken by them in their published tariffs by covering such loading and unloading service in the flat Chicago rate plus the $2.00 per car terminal charge. Consistent with the undertaking, rates and charges of the line-haul carriers in this respect, the Yard Company, so as to prevent a double charge against the shipper, in formulating its tariff of May 21, 1917, provided that the charges in its published tariffs were for services rendered by it "as a carrier's agent."

A. THE UNCONTRADICTED TESTIMONY ESTABLISHES THE FACT THAT BOTH IN THE FLAT CHICAGO RATE AND IN THE $2.00 PER CAR TERMINAL CHARGE WAS INCLUDED COMPENSATION TO THE LINE-HAUL CARRIERS FOR LOADING AND UNLOADING LIVE STOCK AT THAT POINT.

In petitioners' brief on the merits we specifically point out (pp. 4, 5, 44, 45, 46, 47) the testimony and documentary proof which shows beyond a shadow of a doubt that the flat Chicago rate to the Union Stock Yards, plus the $2.00 per car terminal charge, in the published tariffs of the line-haul carriers, covered the through transportation of live stock to the Union Stock Yards, including the unloading thereof. The testimony and the proof referred to are not requestioned by respondent. Opposing counsel are content with the mere statement that the testimony before the Commission shows that neither the line-haul rates nor the $2.00 terminal charge covered compensation to the line-haul carriers for unloading. They, however, are unable to refer to any testimony or documentary evidence which supports this unwarranted statement.

INDISPENSABLE TO RESPONDENTS POSITION THAT EFFECT OF FINDINGS OF FACT BY COMMISSION BE DESTROYED.

Counsel for both respondents, the Yard Company and the Director General, fully realize that in order to sustain the judgment of the Circuit Court of Appeals on the grounds stated in its opinion, it is indispensable that they destroy the force and effect of the finding of the Commission that the line-haul rates to Union Stock Yards, Illinois, plus the $2.00 per car terminal charge in the published tariffs of the line-haul carriers, covered the through transportation of live stock to that station and included unloading (R. 144). This they seek to do by attempting to persuade this court, as they did the Circuit Court of Appeals, (1) that the so-called classifications in the published tariffs of

the line-haul carriers, which provide that it shall be the duty of the shipper to load and unload his live stock, applied to shipments of live stock consigned to Union Stock Yards, Illinois; (2) that the commodity or line-haul rate and said $2.00 per car terminal charge had nothing whatever to do with the question; (3) that in determining the question here involved the court must look to the classifications and absorption clause in the published tariffs of the line-haul carriers, and from such classifications and absorption clause alone determine the respective rights, undertakings and obligations of the line-haul carriers and the shippers with reference to the loading and unloading of live stock at Union Stock Yards, Illinois.

Carefully analyzed, the contention of respondent Director General amounts to this: That before the tariffs of the Yard Company increasing the unloading charge were filed on May 21, 1917, the entire amount of the charges against the shipment for the unloading service at Union Stock Yards, Illinois, was taken care of by the absorption clause in the tariffs of the line-haul carriers, but that after said increased tariffs were filed, 25 cents of the total 50-cent unloading charge of the Yard Company was taken care of by force of the so-called absorption clause in the published tariffs of the line-haul carriers, and the remaining 25 cents of said charge was automatically or by operation of law assessed against the shipper on the authority of the classifications. In other words, the contention seems to be that before May 21, 1917, the so-called classifications had no application whatever to shipments of live stock consigned to Union Stock Yards, Illinois, but after May 21, 1917, they automatically applied and became effective as to every shipment of live stock consigned to that terminal market,—not entirely, but only to the extent of furnishing the basis to exact the controversial 25 cents per car from the shipper.

The question here involved concerns not the question of whether the line-haul carriers in their published tariffs charged the shippers enough to reimburse the line-haul carriers for the increase of 25 cents per car in the charge made by the Yard Company for the unloading service, but whether, in the condition of the published tariffs of the line-haul carriers and the Yard Company on file when the charges in question were collected, there was any lawful authority to collect such additional charge from the shipper.

The record clearly establishes that not only was the original charge of 25 cents per car for the unloading service contained in the $2.00 per car terminal charge, but that there was also contained in the structure of the line-haul rates the commodity charge to Union Stock Yards, Illinois, an amount for reimbursement to the line-haul carriers on account of the unloading service. That this is true is clearly shown by the record before the Interstate Commerce Commission and is nowhere disputed. (See Original Ex. 7, p. 1053; *Board of Trade* v. *C. & A. R. R. Co.*, 3 I. C. C. 235, Original Ex. 7, p. 1044; *Chicago Live Stock Exchange* v. *C. G. W. Ry. Co.*, 10 I. C. C. 428, Original Ex. 7, p. 1055; *Cattle Raisers' Assn.* v. *Fort Worth & Denver City R. Co.*, 7 I. C. C. 513, Original Ex. 7, p. 1040.)

The cases before the Commission above cited were particularly called to the attention of the Commission during the hearings before the Commission. These cases all involved increases in rates on live stock and show beyond question that the line-haul carriers, in asking for such increases in their line-haul rates, specifically included reimbursement to themselves on account of the loading and unloading service.

Classifications Did Not Apply To Shipments Consigned To Union Stock Yards, Ill. To Which Station a Through Rate Had Been Established.

In petitioners' brief on the merits, in subdivision IV, (pp. 51 to 59), we show that while the provisions of Official Classification No. 44 and Western Classification No. 54, providing "the consignor and consignee are responsible for the loading and unloading of the same, the carrier assuming no liability whatever in regard to the loading and unloading," apply to outlying intermediate stations and to stations for which a specific flat through rate or charge had not been made. Such classifications never were applied, and could not be applied, to live stock consigned to the Union Stock Yards in Chicago, because as to that particular situation the published tariffs provided a definite through commodity rate, plus a $2.00 per car terminal charge, which included the unloading service. (See specific finding of the Commission on this subject, R. 144; also testimony of respondent's witness Beyers, Certified Excepts from Original Exhibits, p. 117; also Certified Excerpts from Original Exhibits, pp. 167-169, 171, 172.) Counsel for respondent make no attempt to answer petitioners' brief on this most important proposition.

A Through Rate To a Given Station Always Supersedes General Classifications.

In petitioners' brief on the merits (p. 53) we refer to the rule well established by the Commission and affirmed by the courts, that where a line-haul rate or commodity rate is named in the tariffs with reference to a particular station, such line-haul or commodity rate is the legal rate and supersedes all classifications. Opposing counsel have also wisely ignored this portion of petitioners' brief. It is indeed dangerous ground for respondents.

RESPONDENT IS SILENT REGARDING FLAT INCREASES IN LINE-HAUL RATES AGGREGATING MORE THAN 40%.

It is also most significant that in this connection neither counsel for respondent Yard Company nor counsel for respondent Director General say a single word in their briefs in answer to the portion of petitioners' brief on the merits (p. 75) wherein we point out that the line-haul rates of the carriers, which in part included the expense incurred by the line-haul carriers in paying the Yard Company for the unloading service, were increased three successive times, the first increase being 5 per cent, the second increase being 15 per cent, and the third increase being 25 per cent of the then existing rates.

PETITIONERS POSITION BASED ON SPECIFIC FINDINGS OF FACT BY COMMISSION.

Our position is bottomed on the finding of the Commission (R. 144), "the line-haul rates to Chicago, plus a charge of $2.00 for terminal or switching service, have for years constituted the through charge and included the delivery of live stock to the consignee at the Stock Yards." The position of respondents is dependent on their ability to convince this court that a situation which had existed for more than 50 years, whereby the line-haul carriers assumed to handle the entire expense of loading and unloading live stock at the Union Stock Yards in consideration of their line-haul rates and $2.00 per car terminal charge, could be changed without any change being made in the published tariffs of the line-haul carriers.

B. THE CONTENTION OF RESPONDENT DIRECTOR GENERAL OF RAILROADS THAT THE YARD COMPANY WAS NOT AN AGENT OF THE LINE-HAUL CARRIERS IN THE LOADING AND UNLOADING OF LIVE STOCK AT THE UNION STOCK YARDS IS CLEARLY REFUTED BY THE RECORD.

In this connection counsel for respondent Director General of Railroads obscure the point in issue by contending that the Yard Company was not the agent of the line-haul carriers *in publishing and filing its tariffs.* We have never contended that the Yard Company was acting as the agent for the line-haul carriers *in the publication of its tariffs.* The filing of its tariffs was solely a matter between itself and the government, for which it needed no authority from the line-haul carriers. On the other hand, the actual loading and unloading of live stock at the Union Stock Yards and the charges which it made for that service was wholly a matter between itself and the line-haul carriers for which it performed that service.

YARD COMPANY IN PERFORMING LOADING AND UNLOADING SERVICE DID SO AS AGENT FOR LINE-HAUL CARRIERS.

The uncontradicted fact is that the Yard Company was *created by the line-haul carriers* in the year 1865 as a convenient agency or instrumentality for the loading and unloading of live stock in connection with shipments made by the line-haul carriers to and from the Union Stock Yards and from the time of its organization, continuously acted as agent for the line-haul carriers, not only in loading and unloading live stock consigned from and to the Union Stock Yards, but in guaranteeing and collecting the entire transportation charges of the line-haul carriers, including the amount which the line-haul carriers in their rates imposed against the shipper for the loading and unloading service (R. 22-23, 127, 128,

144). There is no contention made by respondent that from 1865 up to the time of the passage of the Act to Regulate Commerce the actual relation of the Yard Company to the line-haul carriers was strictly that of agent; the contention of respondent rests upon the premise, wholly unsupported by reason or authority, that the passage of the Act to Regulate Commerce *ipso facto* changed the capacity in which the Yard Company acted in performing the loading and unloading service at the Union Stock Yards, and that thereafter the Yard Company, although acting in identically the same manner as before the passage of the Act, was no longer an agent for the line-haul carriers, but a principal in the transaction, having no relation to the line-haul carriers other than that of an ordinary connecting carrier.

INTERSTATE COMMERCE ACT DID NOT ABROGATE RELATION OF PRINCIPAL AND AGENT BETWEEN LINE-HAUL CARRIER AND TERMINAL CARRIER.

When the Yard Company filed its tariffs the rates and charges therein contained were the same as the rates and charges against the line-haul carriers had been before the passage of the Act. Its services and its relation to the line-haul carriers remained identically as before. The sole and only change was that the Yard Company, after the passage of the Act, was required to make public the amount it charged the line-haul carriers for aiding them in completing the through transportation service which the latter in their published tariffs undertook. The method to make public such matters is provided in Section 6 of the Act to Regulate Commerce. There is not contained in the Act to Regulate Commerce any language which indicates that it was the intent of the Congress to change or modify the relation existing between the line-

haul carriers and the agencies or instrumentalities through which the line-haul carriers performed certain incidental services connected with the transportation of property.

Respondent's Explanation of Wording of Tariffs of Yard Company Not Convincing.

On page 52 of brief of respondent Director General it is said, in referring to the reason why the Yard Company, in filing its published tariffs, specified that its rates and charges were (as a carrier's agent):

> "The Yard Company was attempting to relieve itself of the responsibility of a common carrier in order to force the line-haul carriers to assume payment of its charges and relieve the shippers who were its customers of such duty."

This subtle explanation is extremely weak. It is apparent that the Yard Company, in filing its tariffs, did so because, as a common carrier subject to the provisions of the Act to Regulate Commerce, it was compelled to do so. The clear intent of the language used was to make the rates and charges in the tariff of the Yard Company a matter wholly between the Yard Company and the line-haul carriers, as it had always been. The part of the statement that the action of the Yard Company in so filing their tariffs was to relieve the shipper, *who were their customers,* of such duty, is extremely specious when we consider the uncontradicted fact that the shippers were never customers of the Yard Company, had no business relations whatever with the Yard Company, and sustained no relation of privity to the Yard Company.

The wording of the tariffs of the Yard Company, consistent with the position then taken by the Yard Company was that the extra 25 cents per car was not a charge of the Yard Company against the shipper but purely a charge of the line-haul carriers to be collected by the Yard

Company as agent for the line-haul carriers. (Cert. Excerpts Or. Exhibits pp. 25-35)

But whatever may have been the reason which actuated the Yard Company in so wording its tariffs, the fact remains that they were so worded and must so be construed.

QUESTION OF AUTHORITY OF YARD COMPANY TO WORD ITS TARIFFS AS IT DID IS WHOLLY IMMATERIAL.

The Yard Company's tariff does not state that it is *filed and published* as "a carriers agent". *It states that the charges therein contained are its charges as a carriers agent and clearly were intended to limit the application of said charges to the line-haul carriers.* The question of the authority of the Yard Company to so limit the application of its charges does not effect the question of the right of respondents to exact the extra 25 cents per car from the commission men without tariff authority.

COMMISSION DID NOT FIND THAT YARD COMPANY WAS NOT AGENT FOR LINE-HAUL CARRIERS.

On page 53 of the brief of respondent Director General it is said:

> "That the Yard Company was not the agent for the line-haul carriers was found by the Commission in its first opinion. (R. 137)."

In the first place, the reference "R. 137" is to a part of the first report of the Commission which was subsequently reversed and discarded. In the second place, it is not true that the Commission in its first opinion held that the Yard Company was not the agent of the line-haul carriers (R. 137). In this connection counsel for respondent Director General concede, on page 53 of their brief, that the Yard Company, in performing many of the services, set forth in Petitioners Brief on the Merits at pp. 10-11, and in col-

lecting all of the charge in the freight-bills of the line-haul carriers, *except the controversial 25 cents per car*, was acting as their agent. It is also said that the services rendered by the Yard Company in counting the stock, checking their condition, unloading the same, and making a record of the dead and injured, were services which the Yard Company performed for itself for its own protection and in its own interest, in order that it might defend against any loss, damage or injury to an interstate shipment in a suit brought by the shipper against it. This contention, however, has no support in the record. On the contrary, the record conclusively shows that the services referred to were performed by the Yard Company for the use and benefit of the line-haul carriers, and that for such services the Yard Company was compensated by the loading and unloading charge. (Certified Excerpts from Original Exhibits, pp. 45-61-64.)

C. THE DETERMINATION OF THE QUESTIONS INVOLVED CALLED FOR THE EXERCISE OF ADMINISTRATIVE ACTION ON THE PART OF THE COMMISSION.

Counsel for respondent Director General strenuously insist that the only question before the Commission was the legal construction, force and effect of the so-called classifications and the so-called absorption clause in the published tariffs of the line-haul carriers; that neither these classifications, nor the language of said absorption clause, were voluminous, complicated or ambiguous. In this connection they say that the tariffs of the line-haul carriers covering the line-haul rates were not offered in evidence, but that the substance of the tariffs of the line-haul carriers, the substance of the classifications referred to, and the substance of the so-called absorption clause, were shown by the oral testimony of tariff experts who testified on the subject. It is not contended that the Commission did not

have properly before it everything which was essential to a proper determination of the questions involved, and no such complaint is made by respondents.

It is evident that counsel for respondent Director General refer to the fact that the complete tariffs of the line-haul carriers and of the Yard Company were not introduced in evidence before the Commission or in the District Court, in order to combat the fact that the tariffs were voluminous and complicated. The questions involved did not necessitate the introduction in evidence before the Commission of the full and complete published tariffs of the line-haul carriers and of the Yard Company. The only material questions involved concerning the tariffs of the line-haul carriers were:

1. Whether the line-haul carriers in their published rates and charges had established a through rate on live stock to the Union Stock Yards, Illinois;

2. Whether said through line-haul rates plus the $2.00 per car terminal charge included compensation to the line-haul carriers on account of the loading and unloading service.

These questions were purely questions of fact. The affirmative of both of said questions was established by witnesses without the slightest dispute or contradiction. The fact that respondents did not offer in evidence in the District Court, the complete tariffs of the line-haul carriers and the Stock Yard Company conclusively shows that their contention now that this case turns entirely upon a purely legal question, viz.: the meaning of the language of said published tariffs is an afterthought to bolster up the opinion of the Circuit Court of Appeals.

ULTIMATE CONCLUSION OF COMMISSION INSEPARABLY CONNECTED WITH ITS FINDINGS OF SPECIFIC FACTS.

As we have heretofore pointed out in petitioners' brief on the merits (pp. 32 to 38), the determination of the case before the Commission did not turn on the phraseology of the provisions of published tariffs but involved the determination of the many purely questions of fact, which we enumerate on pp. 35-36-37.

PRACTICE CONDEMNED BY COMMISSION WAS NOT THE MERE MAKING OF A SEPARATE CHARGE FOR THE LOADING AND UNLOADING SERVICE.

Counsel for respondent Director General of Railroads confuse the situation by seeking to make it appear that the Commission held in the instant case that the charge for the loading and unloading service must, under the statute, be included in the line-haul rates and that the mere making of a separate charge for a terminal service, such as loading and unloading; was unlawful. The report of the Commission is not subject to such interpretation. Taking as a whole the language of the report of the Commission of July 15, 1920, it is obvious that the Commission had no thought of holding a terminal service such as loading and unloading may not properly be included in the tariffs of the line-haul carriers as a separate item or charge in addition to the line-haul charges. The continued approval of the $2.00 per car terminal charge as a separate charge in the tariffs of the line-haul carriers refutes the meaning ascribed to the order by counsel for respondent. The essence of the report of the Commission is that in view of the situation existing at the Union Stock Yards with reference to the loading and unloading of live stock, the history of the loading and unloading service, and the nature of the service, it was the duty of the line-haul carriers to unload

live stock at that point; that inasmuch as the line-haul rates in the published tariffs of the line-haul carriers, plus a charge of $2.00 for switching or terminal service, constituted the through charge and included delivery of live stock to the consignee at the Stock Yards, it was both an unreasonable and unlawful practice for the line-haul carriers and the Yard Company to settle a controversy between themselves as to the controversial 25 cents per car contained in the published tariffs of the Yard Company by adding that amount to the freight bills of the line-haul carriers, figured on the basis of the line-haul rates plus the $2.00 per car terminal charge specified in the published tariffs of the line-haul carriers, and thus pass the burden of said controversy on to the shipper.

For counsel for respondent Director General of Railroads to attempt to make it appear that the practice condemned by the Commission was that the charges for the loading and unloading were set up as separate charges in the published tariffs is unfair and misleading.

QUESTION OF REASONABLENESS IN AMOUNT OF RATES OF YARD COMPANY AND LINE-HAUL CARRIERS WHOLLY IMMATERIAL IN THIS CASE.

It is urged by counsel for the Director General that inasmuch as the Commission did not condemn as unreasonable or unlawful the loading and unloading charge in the published tariffs of the Yard Company, and did not condemn as unreasonable or unlawful the rates and charges set forth in the published tariffs of the line-haul carriers, it was impossible for any practice resorted to by the line-haul carriers and the Yard Company to collect such charges to be either unreasonable or unlawful. This contention entirely obscures the fact that the through line-haul rates in the published tariffs of the line-haul carriers in and of

themselves alone included the unloading of live stock at the Union Stock Yards, and that in the absence of a change in such published tariffs the controversial 25 cents per car set forth only in the published tariffs of the Yard Company could not be exacted from the shipper. (Petitioners Brief on the Merits, pp. 73-74)

Such contention also loses sight of the fact that the rates and charges in the published tariffs of the Yard Company were therein stated to be the rates and charges of the Yard Company *"as a carrier's agent."*

The rates and charges of the Yard Company *thus restricted* as rates and charges against the line-haul carriers for its services as their agent, may have been both reasonable and lawful. On the other hand, the rates and charges in the published tariffs of the line-haul carriers for the through transportation of live stock to the Union Stock Yards, including the unloading thereof, in and of themselves may have been both reasonable and lawful. But, when the line-haul carriers and the Yard Company, by the practice resorted to by them to settle their controversy with reference to the extra 25 cents per car, tacked together their rates and charges and saddled them on the shipper, the shipper was in fact subjected to a double charge for the same service.

II.

UNDER THIS SUBDIVISION COUNSEL FOR THE RESPONDENT DIRECTOR GENERAL OF RAILROADS SEEK TO PERSUADE THIS COURT TO INQUIRE AS TO THE SUFFICIENCY OF THE EVIDENCE TO SUSTAIN THE FINDING OF THE COMMISSION THAT IT WAS THE DUTY OF THE LINE-HAUL CARRIERS UNDER THE PARTICULAR FACTS AND CIRCUMSTANCES IN THE INSTANT CASE TO LOAD AND UNLOAD LIVE STOCK AT THE UNION STOCK YARDS IN CHICAGO.

Opposing counsel delight in quoting certain portions of the reversed and discarded report of February 15, 1919. All of the findings quoted by counsel for respondent on page 60 were afterwards reversed by the Commission in its report of July 15, 1920. We had always supposed that when the Commission granted a rehearing and heard additional testimony and reversed its previous findings, such previous findings were, to all intents and purposes, out of the case.

That this court will not weigh and consider the testimony before the Commission on questions of fact to determine where the weight of the evidence lies, is so thoroughly established that we need say nothing further than to refer to the rule.

Facts Were Nor in Dispute Before Commission—Respondents Make Them in Dispute Here.

Under this subdivision counsel for respondent say they agree with the statement of the Commission (R. 144) that "the facts in this case are not in dispute." As a matter of fact, the record before the Commission shows that the facts were not there in dispute. That condition, however, has changed since present counsel for Director General (who

were not counsel before the Commission) have entered the case. Now it is apparent that the facts are very much in dispute. To substantiate the assertion, we point to the briefs of opposing counsel where they deny the existence of almost every finding of fact by the Commission upon rehearing.

Section 15 of Transportation Act Has No Bearing on This Case.

It is argued by counsel for respondent Director General that the enactment by the Congress of paragraph 5 of Section 15 of the Transportation Act of 1920, providing:

> "transportation wholly by railroad of ordinary live stock in carload lots destined to or received at public stock yards, shall include all necessary services of unloading and reloading en route, delivery at public stock yards of inbound shipments in suitable pens and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner,"

was an indication on the part of Congress that the law previous to the enactment of the Transportation Act of 1920 did not impose such duty on the line-haul carriers. This argument is not persuasive. In the first place, the decision of the Commission that it was the duty of line-haul carriers transporting live stock to the Union Stock Yards in Chicago to load and unload live stock at that point was not an enunciation of any rule of law on that subject. The finding of the Commission was limited to the duty of loading and unloading live stock at the Union Stock Yards, Ill. under the particular facts and circumstances existing at that particular point, including the history of that part of the transportation service, the inclusion in the flat through Chicago rate and the $2.00 terminal charge of compensation to the line-haul carriers for the expense of that service, and the

many other questions of fact hereinabove referred to particularly relating to the conditions existing at the Union Stock Yards.

The argument of opposing counsel is also clearly untenable for the following reasons:

First: Because the mere fact that Congress, in enacting a detailed and comprehensive transportation act, included in the act provisions which, before that time, were clearly established by decisions of the Supreme Court of the United States, cannot logically be urged as a reason for saying that the Congress was of the opinion that none of the provisions of the act were already the law as the result of judicial decisions. It might more logically be argued that if Congress had omitted from the transportation act the provisions above mentioned, such omission would have shown the intent on the part of Congress to wipe out the effect of the decisions of the Supreme Court of the United States in the *Covington case,* 139 U. S. 128, and in the *Union Stock Yard case,* 226 U. S. 286.

Second: In the *Covington* case, 139 U. S. 128, and in the *Union Stock Yard* case, 226 U. S. 286, the rule was laid down that it was the duty of the carrier, as a part of the general transportation service, to load and unload live stock at two large public stock yards, namely, the stock yards at Covington, Kentucky, and the stock yards at Chicago, Illinois. The amendment to Section 15 of the Transportation Act goes further and provides that such general transportation charge shall include unloading and reloading en route, and at non-terminal stations as well as delivery at large terminal public stock yards. It extends the rule specifically applied by this Court in the *Covington* case to a large terminal station, to all stations, both terminal and en route.

MUCH TESTIMONY WAS HEARD AND A GREAT MASS OF EVIDENCE WAS INTRODUCED BEFORE THE COMMISSION AFTER IT HAD MADE ITS FIRST REPORT.

Under this subdivision counsel for respondent place great stress on the language used by the Commission in its first report (R. 138):

> "In the absence of tariff provisions to the contrary, this is a separate and distinct service not included in the transportation rate."

When the Commission, after the filing of its first report, granted a rehearing with reference thereto, a great mass of testimony was introduced showing conclusively and without contradiction that the published tariffs of the line-haul carriers, covering shipments of live stock to Union Stock Yards, Ill., then and at all times included all expense incurred by the line-haul carriers in the loading and unloading of live stock at Union Stock Yards, Ill. On rehearing, it was conclusively shown that such service was included in the transportation rate to Union Stock Yards, Ill., and the Commission expressly found (R. 144), "the line-haul rates to Chicago, plus a charge of $2.00 for terminal or switching service, has for many years constituted the through charge and included delivery of live stock to the consignee at the stock yards."

III.

THE SPECIFIC FINDING OF THE COMMISSION THAT THE STOCK YARDS WERE THE TERMINALS OF THE LINE-HAUL CARRIERS WAS AMPLY SUSTAINED BY THE EVIDENCE BEFORE THE COMMISSION—IN FACT, THERE WAS NO EVIDENCE TO THE CONTRARY.

Here, again counsel for respondent seek to induce this court to pass upon the sufficiency and weight of the evidence before the Commission.

In the report of the Commission of February 11, 1919 (R. 139, 140), the Commission specifically found as a matter of fact (R. 139):

> "8. The Stock Yards are the terminals for the receipt and delivery of live stock of the railroad utilizing them."

In the same report the Commission (R. 134) says:

> "The Stock Yards are, however, in fact a terminal for the receipt and delivery of live stock; that is one of the purposes for which they were created and one of the uses to which they are now put."

In its subsequent report of July 15, 1920, the Commission, referring to the facts on this subject, again finds (R. 145):

> "Under this state of facts we are of the opinion and find that the Stock Yards are in effect terminals of the line-haul carriers, the Junction Company, and the Stock Yard Company."

The question of the relationship between the line-haul carriers and the Stock Yard Company and the manner in which the Stock Yards' facilities are utilized by the line-haul carriers are both matters of fact amply supported by the evidence before the Commission. It is clear that in the determination of a question of fact that the loading and unloading chutes of the Stock Yard Company were in fact the terminals of the line-haul carriers in the shipment of

live stock was not beyond the constitutional or statutory power of the Commission. Under such circumstances, the determination of that question of fact by the Commission was not subject to review by the Circuit Court of Appeals (*Standard Oil Co.* v. *United States*, 283 U. S. 235; *Interstate Commerce Commission* v. *Delaware L. & W. R. R. Co.*, 220 U. S. 235; *United States* v. *Louisville & N. R. R. Co.* 235 U. S. 314; *Proctor & Gamble* v. *United States*, 225 U. S. 283.) In this connection we invite the attention of this court to the testimony of H. W. Beyers, a freight traffic expert (Orig. Ex. 7, p. 1252—Certified Excerpts from Original Exhibits, pp. 171, 172). Mr. Beyers testified:

> "The Lowrey Tariff indicates the Union Stock Yards as a station on the Chicago Junction Railroad at which are located industries, team tracks and freight houses. In order to determine a rate on live stock to the Union Stock Yards, Chicago, there is indicated the application of rate base No. 6 (see rate bases and facilities referred to with reference to the Union Stock Yards, Illinois, as a station—Certified Excerpts from Original Exhibits, p. 167). Rate base No. 6 advertises the application on inbound movements of the Chicago rate plus a terminal charge of $2.00 per car to and from industries, chutes and sidings. * * * Under this tariff the shipper has before him everything that enters into the transaction of taking a car to the chutes or sidings at the Union Stock Yards and indicates to the shipper that his charge will be the flat Chicago rate plus $2.00 per car terminal charge, and that the carriers, as indicated, will pay the charges of the Union Stock Yard and Transit Company for loading and unloading which was the situation up to the time that the Union Stock Yard and Transit Company changed their tariff basis by advancing it 25c per car both in the matter of loading and unloading charges."

In the consideration of this phase of the case it must at all times be remembered that there is no dispute whatever as to the fact that the published charges of the line-haul carriers all fixed a base rate or commodity rate to the Union Stock Yards, Illinois (Excerpts from Original Exhibits,

pp. 167, 169, 171, 172) and that the line-haul rates to Chicago plus a charge of $2.00 for terminal or switching service constituted the through charge and included the delivery of live stock to the consignee at the Stock Yards (R. 144), up to May 21, 1917 when the Yard Company filed its tariffs increasing its charges.

Union Stock Yards, Ill., Was a Terminal Station Named in Tariffs of the Line-Haul Carriers.

Counsel for respondent Director General strenuously deny our assertion that Union Stock Yards, Illinois, was specifically named in the tariffs of the line-haul carriers as a station to which the base rate or commodity rate applied. That our assertion is correct is indisputably shown by testimony of the tariff expert who testified in behalf of respondent before the Interstate Commerce Commission (Certified Excerpts from Original Exhibits, pp. 171, 172). That fact is also shown by tariff sheet reproduced on page 167 of Certified Excerpts from Original Exhibits. The fact that Union Stock Yards, Illinois, was located on the tracks owned by the Chicago Junction Railway and beyond the rails actually owned by the line-haul carriers is immaterial. The evidence shows that the Chicago Junction Railway owned and operated no engines, cars, or other rolling stock facilities, and had no crews with which to operate the same. The line-haul carriers, in consideration of a trackage charge paid by them to the Chicago Junction Railway, used the tracks of the Junction Railway exactly the same as they used their own, hauling their own trains, with their own crews, over said tracks. The line-haul carriers in their published tariffs treated the Chicago Junction Railway as a part of their own facilities, which it, in fact, was.

Ownership of trackage rights by a railroad is tantamount to "owning its own line" (24 I. C. C. 96, 112) and is "in practical and legal effect the substantial equivalent of an extension of its rails" (62 I. C. C. 261, 267).

The provisions of the Act to Regulate Commerce apply with the same force and effect to the use of facilities not owned by the line-haul carrier but acquired by contract or lease as to facilities which are owned by the carrier originating the shipment. *It is the undertaking of the originating line-haul carrier in its published tariffs to transport live stock to a given destination and the setting up in said published tariffs of through rates and charges for such through transportation service which is of controlling importance.* The question of the ownership of the various facilities incident to such through transportation is wholly immaterial so far as the question here involved is concerned.

IV.

WE ADMIT THE YARD COMPANY WAS A COMMON CARRIER SUBJECT TO THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION AND THAT IT WAS BOUND TO OBSERVE ALL OF THE TERMS, PROVISIONS AND RESTRICTIONS CONTAINED IN ITS PUBLISHED TARIFFS.

While we admit that the Yard Company was, because of the services which it performed in the loading and unloading of live stock as outlined in the opinion of this court in *United States* v. *Union Stock Yards*, 226 U. S. 286, a common carrier subject to the provisions of the Act to Regulate Commerce, it does not follow that in the performing of the loading and unloading service in question it had a separate and independent status with reference to the performance of that service. (See Petitioner's Brief on the Merits,

pp. 59-60-61.) As pointed out by counsel for respondent in their brief (p. 66):

> "The stock could only reach the market by going over the docks into the chutes and through the passageway of the Stock Yards to the sales pens. * * * Such services could be performed by no other carrier and constituted a part of the transportation to the final destination in the sales pens."

The thing which counsel for respondent omits to state in this connection is that the line-haul carriers in their published tariffs not only undertook to employ the facilities owned by them in carrying out their contract of through and complete transportation of live stock to the Union Stock Yards, Ill. with the shipper, but it undertook to furnish as an integral part of said through transportation the facilities of the Junction Company and the Stock Yard Company, and included in its published rates and charges for such through and complete service compensation to itself for the use of its own facilities and the use of the facilities of the Junction Company and the Stock Yard Company.

On page 67 of the brief of respondent, Director General, this significant admission is made with reference to the service rendered by the Yard Company:

> "Its transportation service was a part of the through transportation of live stock from point of origin to destination in the sales pen of the consignee. * * * The Yard Company was a necessary link in such transportation. Without its facilities and service the transportation and delivery could not be completed."

The transportation and delivery above referred to by counsel for respondent, Director General is obviously, the transportation and delivery undertaken by the line-haul carriers in their published tariffs and covered by base rate or commodity rate No. 6, namely, the flat Chicago rate, plus the $2.00 per car terminal charge.

Counsel for respondent Director General, on page 68 of their brief, in referring to the Yard Company, say:

> "When it increased its charges and the line-haul carriers refused to amend their tariffs and absorb the increased amount, it was bound to collect the same from the party for whom it performed the service."

As we have heretofore pointed out, the loading and unloading service for more than 50 years continuously had been performed by the Yard Company as the agent or instrumentality of the line-haul carriers. Therefore, since, as opposing counsel say, the Yard Company was bound to collect the same from the party for whom it performed the service, it necessarily follows that the Yard Company could not collect its charges from the shipper *with whom it had no relation or privity, by contract or otherwise.*

Opposing counsel, on page 68, further say, in referring to the Yard Company:

> "It could not collect from the line-haul carriers because their tariffs did not permit them to pay the increased amount."

We may here appropriately add that it, the Yard Company, could not collect from the shippers or their consignees because the charges in the published tariffs of the Yard Company were stated to be its charges "as a carrier's agent." But the question in this case is not whether the tariffs of the line-haul carriers permitted them to pay the extra 25 cents per car. The question is whether, under all the facts and circumstances of this case, the collection of the extra 25 cents per car from the commission men was justified, either on the authority of the published tariffs of the line-haul carriers on file, or by the published tariffs of the Yard Company.

We submit that if, as opposing counsel strenuously contend, the tariffs of the Yard Company covering its charges

were based on the separate and independent status of the Yard Company and on a separate and distinct service it was performing, the provisions of the absorption clause in the tariffs of the line-haul carriers could have nothing to do with the question as to whom the Stock Yard Company was bound to collect from. That question must be determined solely by the provisions of its own tariffs.

CARRIERS ARE REQUIRED TO OBSERVE CONDITIONS AND RESTRICTIONS IN THEIR PUBLISHED TARIFFS.

We do not question the rule of law as contended for by opposing counsel, "that carrier's tariffs furnish the legal rate to be collected and the carrier is bound to enforce its tariffs," as written. (*Louisville & Nashville Ry. Co.* v. *Maxwell,* 237 U. S. 94; *Louisville & Nashville Ry. Co.* v. *Central Iron Works,* 265 U. S. 59.) We go further and state that the carrier is not only restricted by its published tariffs regarding the *amount* it shall collect, but is also restricted by provisions of its published tariffs with reference to the question of *from whom it shall collect such charges.* (See *Davis* v. *Henderson,* 266 U. S. 92.)

As we have heretofore pointed out in petitioners' brief on the merits (pp. 71-72), the legal rate is not made by statute the lawful rate; that although under Section 6 of the Act to Regulate Commerce the shipper is bound to pay and the carrier is required to collect the exact amount of its published rates and charges, no more and no less, nevertheless the right to recover reparation still exists as to any unreasonable or unlawful charge exacted. (*Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.,* 284 U. S. 370.) Nor do we question the contention of counsel for respondent that the Yard Company could not be required to perform the loading and unloading service in question with-

out compensation. That this is the law can admit of no doubt. Nevertheless, the exaction of the controversial 25 cents per car from petitioners in this case was unlawful, because among other reasons the published tariff of the Yard Company restricted the application of its rates and charges for the loading and unloading service to the line-haul carriers for whom it performed such service as agent and the Yard Company was compelled by law to observe this restriction as well as every other provision in its published tariffs and because in their published tariffs the line-haul carriers provided through rates covering said service.

Respondent's Inability to Understand Wrong Committed Based on Refusal to Notice All of the Facts.

On page 69 of the brief of respondent, Director General of Railroads, it is naively said:

> "It is difficult to understand how it (the Yard Company) could be guilty of a wrong in collecting the charge from the party for whom the transportation service was rendered and also difficult to understand how the Director General could be guilty of a wrong in inserting the Yard Company's charges in the composite bill of the Yard Company and the line-haul carrier covering the freight and unloading charges, such bill specifically stating the 25 cent charge to be that of the Yard Company and assessed under its tariff."

The alleged difficulty of opposing counsel to understand is based on their unwillingness to admit the facts. When the Yard Company in the first instance, after it had increased its loading and unloading charges, refused to collect the increased charge from the shipper, because by the actual wording of its published tariffs the collection of its charges for the loading and unloading service were restricted to the line-haul carriers, it had no difficulty in thoroughly understanding the wrong which it would commit in collecting the charge from the shipper. This phase

of the matter is discussed in petitioner's brief on the merits (pp. 66-69) where it is shown that the Yard Company took the position that the rates and charges in its published tariffs gave it the right to collect such charges from the line-haul carriers and from no one else.

INSERTION OF EXTRA 25 CENTS PER CAR IN FREIGHT-BILLS OF LINE-HAUL CARRIERS GAVE NO RIGHT TO COLLECT IT.

If the Yard Company had no right under its published tariffs to directly collect the controversial 25 cents per car from consignees, it is obvious that the insertion in the freight bills of the line-haul carriers of the controversial 25 cents per car could not justify the collection. If, then, the Yard Company may be said to have collected the controversial 25 cents per car from the shipper, it did so without any authority in its own tariff and without any authority in the published tariffs of the line-haul carriers. On the other hand, if it be said that the line-haul carriers collected the controversial 25 cents per car from the consignee, there was nothing in their published tariffs which justified its collection. The sole and only color of authority to collect the controversial 25 cents per car was the arbitrary insertion of such charge in the freight bills of the line-haul carriers. Each and every item in a freight bill must be authorized by an appropriate published tariff. The items of a freight bill must strictly correspond with the rates and charges contained in published tariffs applicable to the shipment.

Counsel for respondent, Director General, attempt to distinguish the law as laid down by this court in *Covington Stock Yards Company* v. *Keith*, 139 U. S. 128, and by the Court of Civil Appeals of Texas in *Panhandle & S. F. Ry. Co.* v. *Phillips*, 197 S. W. 1031, and *Panhandle & S. F. Ry.*

Co. v. *Crawford*, 198 S. W. 1079, by saying that in those cases the Stock Yard Company there involved was not a common carrier. There is no merit in this attempted distinction because applying the rule laid down by this court in *United States* v. *Union Stock Yards & Transit Co.*, 226 U. S. 286, the Yard Company in all of the three cases above mentioned was necessarily a common carrier. The contention of opposing counsel is premised on the fundamental error that when the live stock reached the end of the line-haul carrier's rails its duty and obligation with reference to the shipment was at an end. This contention purposely or otherwise obscures the uncontradicted fact that the established line-haul rates to Union Stock Yards, Illinois, plus the $2.00 per car terminal charge covered the entire expense to the shipper including unloading. It seems absurd to say that the duty and obligation of the line-haul carriers ended when the live stock reached the end of their lines notwithstanding the fact that in both the $2.00 per car terminal charge and in the through line-haul rate to Union Stock Yards, Illinois, there was included compensation to the line-haul carriers on account of the loading and unloading service.

V.

THE INCREASED CHARGE OF 25 CENTS PER CAR WAS EXACTED FROM YOUR PETITIONERS IN THIS CASE AS THE RESULT OF AN UNLAWFUL PRACTICE IN WHICH BOTH THE LINE-HAUL CARRIERS AND THE YARD COMPANY WERE JOINT PARTICIPANTS; IT WAS WHOLLY IMMATERIAL WHICH OF THEM IN THE FIRST INSTANCE PHYSICALLY COLLECTED THE CHARGE, OR, IN THE LAST ANALYSIS, WHICH OF THEM RETAINED IT.

In this connection opposing counsel distort and misrepresent to this court the allegations in petitioners' petition filed in the District Court. On page 72 counsel for respondent, Director General, say:

> "In their petition (R. 13), petitioners expressly allege
>
> > 'that the shippers and receivers of live stock, including plaintiffs, were compelled to and did pay the defendant, the Union Stock Yards and Transit Company * * * an amount in excess of the former tariff charge, etc.' ".

By the use of asterisks opposing counsel seek to give the impression that petitioners admitted that the Yard Company collected the increased charge of 25 cents per car from the shipper. Supplying the words omitted in the averment quoted, the averment reads as follows:

> "shippers and receivers of live stock, including plaintiffs, were compelled to and did pay the defendant, the Union Stock Yards and Transit Company *and the railroad companies hereinabove referred to* * * * an amount in excess of the former tariff charge for each car of live stock unloaded or loaded by the Union Stock Yard and Transit Company".

That opposing counsel knew full well that the allegation in petitioners' petition referred to the exaction of the charge

by the Yard Company *and the line-haul carriers* jointly, is shown by the sentence following the garbled quotation:

> "It is true the Director General is included with the Yard Company in such allegation."

To sustain the premise made in this portion of their argument that the Commission found that the increased charge of 25 cents per car was collected from the shipper by the Yard Company, opposing counsel refer (R. 123) to the first report of the Commission without frankly stating to the court that the first finding of the Commission was reversed and discarded by the Commission upon further hearing in the second and effective report wherein the line-haul carriers and the Yard Company were jointly and severally found to be liable on account of the practice resorted to by them to exact the controversial 25 cents per car from petitioners in this case.

YARD COMPANY COLLECTED EXTRA 25 CENTS PER CAR AS AGENT FOR LINE-HAUL CARRIERS ON THE AUTHORITY OF THE FREIGHT-BILLS GIVEN TO IT FOR COLLECTION BY LINE-HAUL CARRIERS.

Counsel for respondent Director General, on page 73, seek to justify what was done by respondents to settle the controversy between themselves by the arrangement made to include the controversial 25 cents per car in the line-haul carrier's freight bills against the commission men by attempting to show that the extra 25 cents per car was the charge of the Yard Company and that the Yard Company alone exacted the same from petitioners; that therefore it alone could be held liable to make reparation. This contention obscures the uncontradicted fact in this case that the Yard Company absolutely refused to collect the extra 25 cents per car from the consignees named in the shipments in question under the authority of its own tariffs, and that it was only after the line-haul carriers had agreed

that the extra 25 cents per car should be added to *their* freight bills that the Yard Company agreed to collect the same, *not as a charge of its own, but as a charge of the line-haul carriers.*

Throughout the controversy and in the settlement thereof the Yard Company took the position that, in collecting the controversial 25 cents per car, it was doing so entirely on the authority of the freight bills of the line-haul carriers, and that in making such collection it was acting as agent of the line-haul carriers exactly the same as when it collected the other charges in the freight bill. (See Excerpts from Original Exhibits 83-84.)

RESPONDENT ADMITS THAT YARD COMPANY IN COLLECTING ALL ITEMS OF FREIGHT-BILLS, EXCEPT THE EXTRA 25 CENTS PER CAR, WAS ACTING AS AGENT FOR LINE-HAUL CARRIERS.

The strange and incongruous position which counsel for respondents are compelled to take on this phase of the case is that as to all charges contained in the freight bills of the line-haul carriers they admit (Brief 53) that the Yard Company in collecting the same was acting as the agent of the line-haul carriers, but as to the collection of the extra 25 cents per car it was acting wholly for itself!

VI.

WHILE IN GENERAL THE MAKING AND COLLECTING OF A SEPARATE CHARGE FOR A TERMINAL SERVICE IN ADDITION TO THE LINE-HAUL RATES IS PROPER AND LAWFUL, THE MAKING AND COLLECTING OF A SEPARATE CHARGE FROM THE SHIPPER ON THE AUTHORITY OF THE PUBLISHED TARIFFS OF THE YARD COMPANY FOR A SERVICE WHICH WAS ALREADY COVERED BY THE ESTABLISHED LINE-HAUL RATES TO UNION STOCK YARDS, ILL., PLUS $2.00 PER CAR TERMINAL CHARGE, WAS BOTH UNREASONABLE AND UNLAWFUL. THE FINDING OF THE COMMISSION THAT THE PRACTICE RESORTED TO BY THE LINE-HAUL CARRIERS AND THE YARD COMPANY WAS AN UNREASONABLE AND UNLAWFUL PRACTICE, BEING INSEPARABLY CONNECTED WITH THE DETERMINATION OF FACTS BY THE COMMISSION, SHOULD BE ACCEPTED BY THIS COURT.

Under this subdivision counsel for respondent Director General again attempt to befog the real question of substance in this case by seeking to make it appear that the finding of the Commission that

> "the collection of separate charges from the shippers for unloading or loading in addition to the rates on live stock from and to interstate points to and from the Stock Yards was an unlawful and unreasonable practice,"

was based on the purely legal question as to whether or not it was unlawful to set up the charges for the loading and unloading service separately from the line-haul rates. We have heretofore, on pp. 24 to 28, *supra*, shown the fallacy of this contention.

STATEMENT OF QUESTION INVOLVED BEFORE THE COMMISSION.

The Commission having found that it was the duty of the line-haul carriers to unload live stock consigned to Union Stock Yards, Ill., as an integral part of the transportation service, and having held that the line-haul rates to Union Stock Yards, Ill., plus the $2.00 per car terminal charge, constituted the through rate to Union Stock Yards, Ill., including the unloading service, the question before the Commission was: WHERE A LINE-HAUL CARRIER IN ITS PUBLISHED TARIFFS HOLDS ITSELF OUT TO THE PUBLIC TO TRANSPORT LIVE STOCK TO THE UNION STOCK YARDS, ILL., FOR A THROUGH RATE OR CHARGE, WHICH INCLUDES THE UNLOADING OF SUCH LIVE STOCK, IS THE SETTING UP OF A SEPARATE CHARGE FOR THE UNLOADING SERVICE IN THE PUBLISHED TARIFFS OF AN AGENCY WHICH PERFORMS THE UNLOADING SERVICE FOR THE LINE-HAUL CARRIER AND THE EXACTION FROM THE SHIPPER OF BOTH THE THROUGH RATE OR CHARGE OF THE LINE-HAUL CARRIER AND THE SEPARATE ADDITIONAL CHARGE IN THE PUBLISHED TARIFFS OF SUCH AGENT, AN UNLAWFUL PRACTICE?

The Commission properly held such practice both unreasonable and unlawful and properly held the extra 25 cents per car to be an unlawful charge (R. 151).

RIGHT OF LINE-HAUL CARRIERS TO SET UP IN PUBLISHED TARIFFS A SEPARATE CHARGE FOR LOADING AND UNLOADING NOT INVOLVED.

In attempting to obscure the real question of substance involved by making it appear that the practice condemned by the Commission was merely that of setting up in the combined tariffs of the line-haul carriers and the Yard Company a charge for the loading and unloading service separately from the charge of the line-haul carriers, counsel quote from paragraph 1 of Section 6 of the Act to Regulate

Commerce, (49 U. S. C. A., Section 6, paragraph 1, pages 240-241) which provides:

> "The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried and shall contain the classification of freight in force, *and shall also state separately all terminal charges*, storage charges, icing charges and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise shall affect or determine any part or the aggregate of such aforesaid rates, fares and charges or the value of the service rendered to the passenger, shipper or consignee." (Italics theirs.)

It is manifest that the portion of paragraph 1 of Section 6 quoted refers to the contents of the separate schedules of a single carrier. It does not refer to the combined schedules of two or more common carriers. Obviously, also, said paragraph does not warrant a single particular item of service connected with the transportation of property to be controlled in part by the schedules of one common carrier and in part by the schedules of another common carrier. As applied to the schedules of a single common carrier, it undoubtedly authorizes and requires such common carrier to state separately in such schedules all terminal charges in addition to the commodity or line-haul rates in such schedules. But by no process of reasoning can it be construed to mean that a given common carrier may in its schedules set up through line-haul rates and a terminal charge which together cover compensation for such terminal service, and at the same time allow another common carrier to set up in its published tariffs a charge for the identical terminal service and justify the imposition of the charges of both common carriers against the shipper. This question was not involved in *Interstate Commerce Commission* v. *C. B. & Q. R. R. Co.*, 186 U. S. 320, or in *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98.

Counsel for Director General quote from the opinion of this court in *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, for the purpose of justifying the setting up in the schedules of two common carriers charges covering the same item of service. Manifestly, that case does not announce any such rule. In that case the Commission specifically found that the $2.00 per car terminal charge was just and reasonable. The Commission condemned the $2.00 per car terminal charge, notwithstanding it had already held said charge to be just and reasonable, on the ground that when the terminal charge and the line-haul rates were added together they together, in the aggregate, were unreasonable and unjust. That situation is not analogous to the situation here presented.

In the *Stickney* case it is said:

> "For services that it (meaning the carrier) may render, *or procure to be rendered*, off its own line or outside the mere matter of transportation over its line, it may charge and receive compensation."

We agree entirely with this statement of the law, but, as we have heretofore pointed out, that is not the question here. If the complaint in this case had been that the charges of the Yard Company in its published tariffs, added to the charges contained in the published tariffs of the line-haul carriers, were in the aggregate unreasonable and unjust, and the Commission had found that the charges of the Yard Company were properly assessable against the shipper, and that such charges in and of themselves were just and reasonable, *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, would apply; but in the instant case such questions were not involved, because the holding of the Commission that it was the duty of the line-haul carriers to load and unload live stock at Union Stock Yards, Ill., as a necessary and integral part of the transportation of such live stock to that station, and that the line-haul rates to Chicago plus a charge of $2.00 for terminal or switching service con-

stituted the through charge and included delivery of live stock to the consignee at the Stock Yards, made it wholly unnecessary for the Commission to consider the reasonableness either of the line-haul rates plus the $2.00 per car terminal charge in the published tariffs of the line-haul carriers, or the reasonableness of the loading and unloading charges in the published tariffs of the Yard Company.

We agree with the statement of counsel for respondent Director General (p. 80):

> "Where the terminal charges and the line-haul charges are stated separately, if the aggregate is unreasonable, the reduction must be in the factor making up the through rate which is unreasonable. Neither factor can be determined to be unreasonable unless evidence is produced supporting such conclusion."

The fallacy of the entire argument of counsel for respondent Director General on this phase of the case is clearly shown by the following mis-statement of fact on page 75 of their brief:

> "The entire charge for transporting the live stock from point of origin to destination in the Yards is made up of the line-haul rate and of the Yard Company's charge for its common carrier service."

and by their erroneous statement on page 81, where they liken the services and charges of the line-haul carriers and of the Yard Company to the distinct and separate services and charges of connecting carriers dealing in their published tariffs with different portions or items of an entire transportation transaction. If the line-haul carriers and the Yard Company in this case had severally performed separate and distinct parts in the aggregate service involved in the transportation of live stock, and each in its published tariffs had confined its rates and charges to the particular portion of the services respectively performed by each, then there would have been a basis for the statement of opposing counsel that "each tariff is for the serv-

ices performed and the facilities furnished by the carrier filing the tariff; the tariff of neither covers any part of the service of the other." The above quotation from the brief of Director General demonstrates the false premise upon which opposing counsel have built their case.

VII.

THE YARD COMPANY IN PERFORMING THE LOADING AND UNLOADING SERVICE AT ALL TIMES SINCE ITS CREATION ACTED AS THE AGENT OR INSTRUMENTALITY OF THE LINE-HAUL CARRIERS PERFORMING A SERVICE INSEPARABLY CONNECTED WITH THE UNDERTAKING OF THE LINE-HAUL CARRIERS IN THEIR PUBLISHED TARIFFS AND IN ITS PUBLISHED TARIFFS SPECIFICALLY STATED THAT THE RATES AND CHARGES CONTAINED IN ITS PUBLISHED TARIFFS WERE FOR SERVICES WHICH IT PERFORMED AS A CARRIER'S AGENT.

In petitioners' brief on the merits (pp. 65-69) we invite the attention to the various places in the record of the Commission which conclusively show that the Yard Company in performing the loading and unloading service at all times since its creation acted as the agent for the line-haul carriers who directly paid the Yard Company for the performance of that service and that in filing its published tariffs it specifically recognized the capacity in which it performed that service and made the rates and charges in its published tariffs conform to that fact. This is specifically shown by the caption in its published tariffs of May 21, 1917 preceding the enumeration of rates and charges. That caption is as follows (Certified Excerpts from Original Exhibits, p. 13):

> "The charge made by this Company for the service (as a carrier's agent) of loading and unloading live stock at the Union Stock Yards of Chicago is as follows".

Recognizing the vital significance of this language in the published tariffs of the Yard Company and its destructive effect on their contentions, counsel for respondent, Director General, strenuously attempt to destroy the effect of the words "as a carrier's agent" as contained in the published tariffs of the Yard Company, first by attempting to persuade the court that such language must be rejected as surplusage, and then attempting to show that the Yard Company had no authority from the line-haul carriers to file its tariffs in such a manner as to restrict the application of its rates and charges to the line-haul carriers.

THE WORDS "AS A CARRIER'S AGENT" MUST BE REGARDED AND GIVEN THEIR INTENDED EFFECT.

It is obvious that the words "as a carrier's agent" were inserted for the purpose of restricting and limiting the application of such rates and charges to the line-haul carriers for a service which the Yard Company performed for the line-haul carriers as their agent. The language of the published tariffs of the Yard Company in this respect must be construed in the light of the facts which were not controverted before the Commission, viz., that the Union Stock Yard & Transit Company was organized by the line-haul carriers entering Chicago for the purpose of performing for the line-haul carriers terminal services involved in the shipment of live stock to Chicago, including the loading and unloading service; that continuously for more than 50 years the Stock Yard Company performed such terminal service for and on behalf of the line-haul carriers and were paid directly by the line-haul carriers for the performance of that service. The close unity of operation between the line-haul carriers and the Yard Company, as outlined in petitioners' brief on the merits (pp. 9-12), conclusively establishes that in the performing of the loading and unloading service, and the various other services enumerated at pages

9 to 12 of petitioners' brief on the merits, the Yard Company was acting as the agent and instrumentality of the line-haul carriers.

Obviously, the object and purpose of inserting the words "as a carrier's agent" in the published tariffs of the Yard Company was not to convey the meaning that the Yard Company was publishing the tariff as and for a tariff of the line-haul carriers, nor to indicate that it had authority of the line-haul carriers to file such tariff. The words "as a carrier's agent" explain, limit, and define the words, "the charge made by this company for the service of loading and unloading live stock at Union Stock Yards, Chicago"; thus explained, it is apparent that the words "as a carrier's agent" parenthetically inserted in the published tariffs of the Yard Company were deliberately inserted to prevent a construction that such charges were to be assessed against the shipper in addition to the through line-haul rates plus the $2 per car terminal charge in the published tariffs of the line-haul carriers.

No Denial or Repudiation of Claim of Yard Company That It Performed Loading and Unloading Service as Agent for Line-Haul Carriers Until After Suit Was Brought.

On page 82 of brief of respondent, Director General, it is stated that when the Yard Company filed its tariff stating that the rates and charges therein contained were for services which it rendered as a carrier's agent, the line-haul carriers immediately protested against the idea that the Yard Company was their agent in filing the tariff or in performing its common carrier service. On page 84, in referring to the words "as a carrier's agent" in the published tariffs of the Yard Company, they say:

"The line-haul carrries did not permit such misstatement to go unchallenged but at once repudiated

> the same and long before Federal control shippers knew of such repudiation."

These statements are without the slightest support in the record. There was no such repudiation and no such protest.

But if there had been the situation would have been exactly the same. This court has repeatedly held that a carrier must strictly observe, enforce and comply with not only the rates and charges set forth in its published tariffs, but every provision, restriction and limitation contained in the tariffs. (*Davis* v. *Henderson,* 266 U. S. 92-93). Obviously, neither the terms and provisions of published tariffs, nor the legal effect of the same, can be changed by protests or repudiations.

Counsel for respondent, Director General, irrelevantly say on page 84 of their brief:

> "If the shippers were damaged by the misstatement their remedy, if any, would be against the party committing the wrong. They were not, however, damaged or affected by such misstatement in respect to any shipment in controversy. They knew of the misstatement long before any shipment in controversy was made."

Such argument either shows a desperate attempt to obscure the question of substance involved or a lack of understanding of the force and effect of published tariffs.

Counsel for respondent on page 84 in referring to the words "as a carrier's agent" as used in the published tariffs of the Yard Company say:

> "Such language did not authorize shippers to understand the charge was imposed upon the line-haul carriers".

This statement is strangely inconsistent with the attempt of counsel for respondent to influence the court by the repeated unwarranted statement that the line-haul carriers protested against the representation of the Yard Company in its published tariffs that it was acting as a carrier's

agent, and repudiated the representation. If such language did not warrant shippers to understand that the charge was imposed upon the line-haul carriers, why the reason for alleged protest and repudiation on the part of the line-haul carriers?

MEANING OF TARIFFS OF YARD COMPANY FRANKLY STATED BEFORE COMMISSION.

Furthermore, as we have pointed out in petitioners' brief on the merits (pp. 68-69), one of the eminent counsel here representing the Yard Company, in referring to the phraseology of the published tariffs of the Yard Company, among other things, said (Certified Excerpts from Original Exhibits, p. 56):

> "I say that the plain phraseology of the tariff shows that we proposed to increase the charge for the service we rendered to those for whom we have always rendered it, to-wit: carriers whose agents we are, and not to any shipper in the United States."

ANSWER FILED BY YARD COMPANY IN DISTRICT COURT ALLEGES AGENCY.

As we also pointed out in petitioners' brief on the merits (p. 64), the answer of the Yard Company filed in the District Court in the instant case specifically sets up that during the times referred to in the petition it was acting as the agent of the railroads or line-haul carriers hauling said shipments into and out of said yards (R. 28-29.)

A NEW IDEA AS TO MEANING OF WORDS "AS A CARRIERS AGENT" IN TARIFFS OF YARD COMPANY.

In this connection counsel for respondent say, on pages 84 and 85 of their brief:

> "The inference to be drawn from such language, had it not been challenged, was that the charge was

being imposed on the shipper by the Yard Company acting as agent of the line-haul carriers, *i. e.*, the tariff was really a tariff of the line-haul carriers published by the Yard Company as their agent."

It is difficult to reconcile this new idea of the meaning of the language of the published tariffs of the Yard Company with the previous strenuous argument of opposing counsel (page 84 of their brief), in which they say that the words "as a carrier's agent" meant nothing and should be rejected as surplusage. It is also difficult to reconcile this new idea of the meaning of the language of the published tariffs of the Yard Company with the uncontradicted fact that the Yard Company itself at all times insisted that the "plain phraseology of the tariff" shows that the increase in charges in such tariff was intended to be assessed against the line-haul carrier and not against the shippers (Certified Excerpts from Original Exhibits, pp. 57-58, R. 22-23).

RULE GOVERNING JOINT RATES NOT INVOLVED IN THIS CASE.

Counsel for respondent Director General urge that the line-haul carriers could not be bound by the published tariffs of the Yard Company, because it did not file with the Commission evidence of concurrence therein or acceptance thereof, as provided in Section 6, paragraph 4, of the Act to Regulate Commerce (49 U. S. C. A., Section 6, paragraph 4, page 281). Section 6 referred to applies to the joint tariff of several carriers each performing services separate and distinct from the other.

As we pointed out in petitioners' brief on the merits (pp. 61-62), this case is not one to which the rules with reference to joint rates apply. The shipper had nothing whatever to do with the question of whether the line-haul carriers concurred in the published tariffs of the Yard Company, or whether the Yard Company concurred in the published tariffs of the line-haul carriers, and had no interest

in that matter. Those matters were wholly between the line-haul carriers and the Yard Company. The question, however, of the right of the line-haul carriers and the Yard Company, or either of them, to exact the extra 25 cents per car from the shipper, was dependent upon the plain language of the published tariffs on file and not on the question of concurrence and acceptance, as provided for in Section 6, paragraph 4, of the Act to Regulate Commerce.

We agree with the statement of opposing counsel, on page 86 of their brief, where, in referring to the Yard Company after it had filed its tariffs of May 21, 1917, increasing its previous charges, they state:

> "Its status as a common carrier had not changed in the meantime. Its relations with the line-haul carriers had not changed in the meantime. Its relations with the shippers had not changed."

THE WORDS "AS A CARRIER'S AGENT" IN TARIFFS OF YARD COMPANY WERE DELIBERATELY USED FOR A CERTAIN DEFINITE PURPOSE AND CANNOT BE REJECTED AS SURPLUSAGE.

In this connection, counsel for respondent, referring to the statement in the published tariffs of the Yard Company of May 21, 1917, to the effect that the charges therein contained were for its services "as a carrier's agent", say that this was a "mis-statement"; that the limiting effect of the language of such tariffs "was unauthorized by law, unauthorized by the Commission, and unauthorized by the line-haul carriers, and became and was mere surplusage." The irrelevant question of whether the statement in the published tariffs of the Yard Company, was authorized by the Commission or authorized by the line-haul carriers, must not be allowed to obscure the real question of substance in this case as to whether or not, under the existing published tariffs of the Yard Company and the line-haul carriers on file during the period in question, the

exaction of the extra 25 cents per car from the commission men, petitioners in this case, was lawfully justified.

Attempt To Shift Entire Blame On Yard Company Futile.

Lastly, under this subdivision, counsel for respondent Director General seek to shift the onus of the practice condemned by the Commission to the Yard Company by saying:

> "The consequences must rest on the Yard Company, who attempted the unauthorized thing, and not on the line-haul carriers, who neither participated therein nor profited thereby."

This attempt to shift responsibility obscures the proposition that the adoption of a practice by which there is exacted from the shipper an unlawful or unjustifiable charge is a tort, which renders all who participate in such practice jointly and severally liable to make reparation; that in such tort action the court will not weigh the degree to which each of the participants in such practice participate.

Counsel for respondent Director General frankly concede in their brief (p. 89) that the line-haul carriers did participate in the exaction of the extra 25 cents per car from the commission men by adding that amount to their freight bills, which were afterwards collected by the Yard Company. This alone was sufficient to constitute the line-haul carriers joint tort feasors in the transaction.

VIII.

THE ARGUMENT OF RESPONDENT THAT CONGRESS DID NOT CONSENT THAT THE AGENT APPOINTED BY THE PRESIDENT MIGHT BE PROCEEDED AGAINST BEFORE THE INTERSTATE COMMERCE COMMISSION FOR A TORT, BUT ONLY FOR DAMAGE RESULTING FROM THE COLLECTION OR ENFORCEMENT BY OR THROUGH THE PRESIDENT DURING THE PERIOD OF FEDERAL CONTROL OF RATES, FARES, CHARGES, CLASSIFICATIONS, REGULATIONS AND PRACTICES, STATES AN ANOMALOUS POSITION.

This court has repeatedly held that the exaction from the shipper of an unreasonable or unlawful charge is, of itself, a tort. It would therefore seem that since "the collection or enforcement of rates, fares, charges, classifications, regulations, or practices which are unjust, unreasonable, unjustly discriminatory or unduly or unreasonably prejudicial," in and of itself constitutes a tort, the argument of respondent that Section 206-A of the Transportation Act of 1920 did not constitute consent on the part of Congress that the agent appointed by the President might be proceeded against before the Interstate Commerce Commission for a tort, is anomalous.

It is apparent that counsel for respondent under this subdivision seek to make it appear that the proceedings for reparation before the Commission and this suit is against the Director General as an agency or arm of the Federal Government. This is not correct. The proceedings before the Commission and the suit in question were against the line-haul carriers operating under Federal control and not against the Government. While the Director General was a necessary party because of the provisions of the Federal Control Act, the proceedings before the Commission and the suit here in question were to all intents and purposes

against the line-haul carriers (*Missouri Pacific R. R. Co.* v. *Ault*, 256 U. S. 554).

While counsel for respondent Director General have quoted Section 206-A of the Transportation Act of 1920 (49 U. S. C. A. Section 74, Page 357), they omit to call the attention of the court to Section 10 of the Federal Control Act, Chapter 25, 40 Stat. 451, 456, 457, which in part provides:

> "SECTION 10. That carriers, while under Federal Control, shall be subject to all laws and liabilities as common carriers whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other act applicable to such Federal Control or any order of the President. Actions at law or suits in equity may be brought by or against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government."

The argument of counsel for respondent under this subdivision is completely refuted by this court in *Missouri Pacific R. R. Co.* v. *Ault*, 256 U. S. 554, where this court, speaking through Mr. Justice Brandeis, says on page 559, in referring to the provisions of Section 10 of the Federal Control Act:

> "The Government was to operate the carriers, *but the usual immunity of the sovereign from legal liability was not to prevent the enforcement of liabilities ordinarily incident to the operation of carriers* . . . Operation was to be continued as theretofore with the old personnel, subject to change by executive order. *The courts were to go on entertaining suits and entering judgments under existing law*, but the property in the hands of the President for war purposes was not to be disturbed. With that exception the substantial legal rights of persons having dealings with the carriers were not to be affected by the change of control." (Italics ours.)

Respondent Distorts Plain Meaning of Language of Commission's Orders.

Counsel for respondent, Director General, next distort the plain language and meaning of the orders entered by the Commission in the instant case by seeking to make it appear that in said orders the real purpose of the Commission was to require the Director General to absorb the increase in the Yard Company's charges, and that the wrong for which the Director General was held liable was his refusal to absorb the increase and that it was not the intent of Congress to vest in the Interstate Commerce Commission authority, to grant reparation on account of such failure on the part of the Director General to absorb the increase. In the first place if the premise of this argument was correct it would make no difference under Section 10 of the Federal Control Act and Sec. 206A of the Transportation Act. Furthermore, there is nothing in the order of the Commission which condemns the Director General for any failure to absorb the increase. On the contrary, the orders of the Commission carefully refrain from passing upon or determining any question whatever affecting the respective rights of the Director General and the Yard Company with reference to such absorption. The Commission in refusing to consider this phase of the case (R. 145) says:

> "The apprehensions of the line-haul carriers that the Stock Yards Company may make any charge it pleases which they will be required to pay are not well founded upon their complaint or upon the complaint of any party. We can examine any of the charges that make up the sum of the through charges and may prescribe just and reasonable rates for all carriers concerned, either by prescribing through routes and joint rates and divisions thereof, or otherwise, as the facts may warrant".

On page 88 counsel for respondent, Director General, say:

> "The Director General did not question a rate at all; did not establish the rate complained of. He merely refused to increase an absorption. The Yard Company established the rate, collected it, and retained it as compensation for the service which it rendered".

Again, we point out that this statement obscures the fact that had it not been for the active cooperation and affirmative acts of the line-haul carriers in adding the controversial 25 cents per car to their freight bills and through the agency or instrumentality of the Stock Yard Company collecting the same from petitioners, this case would never have arisen.

To substantiate the contention that the Commission found that the Yard Company collected and retained such charges from the shipper, counsel for Director General refer to the report of the Commission of February 11, 1919, (R. 123) without frankly stating to the court the fact that the language quoted was contained in a report afterwards reversed and disregarded by the Commission upon further hearing.

On page 89 of their brief counsel for Director General attempt to minimize the part which the line-haul carriers took in the unlawful exaction from petitioners of the controversial 25 cents per car by naively stating:

> "No complaint is made of the freight charge, and we must therefore assume that the putting of the additional 25 cent charge for unloading on the bill and the collecting of it constitutes the alleged joint tort. In that sense, the Director General assisted in the collection by the Yard Company, but such assistance is not an act for which the Commission was given jurisdiction to impose a liability on the Director General."

The record shows that the Director General not only assisted in this manner, but that the entire

freight charges, including the controversial 25 cents per car, were turned over by the Yard Company and the total amount received as operating revenue for the line-haul carriers. This is plainly shown by the testimony of H. W. Beyers, the principal witness for the line-haul carriers before the Commission, who, in referring to the practice resorted to by the line-haul carriers and the Yard Company to settle their controversy with reference to the controversial 25 cents per car, testified; (Certified Excerpts from Original Exhibits, p. 40):

> "We (meaning the line-haul carriers) got up to the point where we reached an understanding with your company (meaning the Yard Company), that made it possible for us to conserve our revenue and not have you withhold the 25 cents."

Mr. Beyers further testified (Certified Excerpts from Original Exhibits, p. 41):

> "Mr. Shaw: On the contrary, rather than go to the trouble of collecting your bills, you preferred to plus your bills 25 cents and still give them to us for collection, did you not?
>
> Mr. Beyers: Well, it was an amicable adjustment of differences that existed at that time.
>
> Mr. Shaw: That is what you did?
>
> Mr. Beyers: Yes, sir."

IX.

THE ABSORPTION TARIFFS OF THE LINE-HAUL CARRIERS DID NOT FURNISH THE MEASURE OF THEIR OBLIGATION WITH REFERENCE TO THE LOADING AND UNLOADING SERVICE.

We have heretofore discussed, in petitioners' brief on the merits (pp. 51 to 59), our contentions with reference to the force and effect of said absorption clause under the particular facts and circumstances in this case. It is unnecessary here to repeat what we there said. We will

confine our discussion of this subdivision of the brief of respondent Director General to pointing out the incorrect and misleading statements therein made.

On page 91 counsel for respondent says:

> "The line-haul carriers filed their tariffs fixing their rates for transportation, which limited the transportation to the carrier's own line with delivery to a connecting carrier if destined beyond the line of the originating carrier."

As we have heretofore pointed out, the Union Stock Yards, Ill., was specifically named as a terminal station in the published tariffs of the line-haul carriers, and through rates and charges, plus a $2.00 per car terminal charge, were provided in such tariffs for the through transportation of live stock to the Union Stock Yards, Ill., including the unloading. In the establishment of such through rates and charges, and in said published tariffs, the Union Stock Yards, Ill., was treated exactly as if it had been situated at the end of the tracks actually owned by the line-haul carriers, and in such published tariffs the facilities of the Chicago Junction Railroad and of the Union Stock Yard & Transit Company were treated exactly the same as if they had been absolutely owned and operated by the line-haul carriers. The record conclusively shows that the Chicago Junction Railroad operated no engines or cars or other instrumentalities of transportation. It merely owned the tracks upon which the line-haul carriers, in delivering live stock to the Union Stock Yards, operated their own trains, cars and other equipment with their own crews. The payment by the line-haul carriers to the Chicago Junction Railroad of a trackage charge made the tracks and facilities of the Chicago Junction Railroad, to all intents and purposes, the tracks and facilities of the line-haul carriers.

The same is true with reference to the facilities of the Yard Company. It made no difference to the shipper, so far as the application of the rates and charges in the published tariffs of the line-haul carriers were concerned, whether the line-haul carriers actually owned or operated the Stock Yards, or whether they employed an agency to perform for them a transportation duty which they owed to the shipper.

This court will take judicial notice that in practice many of the incidental terminal services connected with the through transportation of property are performed by agencies or instrumentalities selected by the carrier to enable the carrier to carry out its contract of shipment with the shipper.

EVEN IF ABSORPTION CLAUSE LIMITED PAYMENT TO YARD COMPANY OF SPECIFIC NUMBER OF CENTS THEREIN MENTIONED, THIS CANNOT EXCUSE THE EXACTION OF THE EXTRA 25 CENTS PER CAR FROM PETITIONERS.

In this connection it is urged by counsel for the Director General that the line-haul carriers were prevented by the absorption clause in their published tariffs from paying the Yard Company anything in excess of that provided in said absorption clause; that to have done so would have been in violation of the Act. It is useless for opposing counsel to thus attempt to confuse the issue here involved. What amount should have been paid by the line-haul carriers to the Yard Company for the performance of the loading and unloading service was entirely a matter between the line-haul carriers and the Yard Company. True, the Yard Company was as a common carrier legally bound to publish its tariffs covering the services it performed and the rates and charges for such services but the filing

of such tariffs did not change the actuality with reference to the nature of the services performed or the capacity in which they were performed. If the line-haul carriers deemed the increase of 25 cents per car excessive, its remedy was to have applied to the Commission to settle that question. On such application it would have been determined what compensation the Yard Company was entitled to receive for its services and what amount, if any, of such charges the line-haul carriers should absorb. But respondents chose to expedite the settlement of their controversy by resorting to the practice condemned by the Commission with the result that the controversial 25 cents per car was exacted from the commission men. The record shows without the slightest contradiction that the line-haul carriers had for more than 50 years made the matter of the expense for the loading and unloading of live stock at the Union Stock Yards, Illinois, a matter solely between themselves and the Yard Company, and made their rates and charges sufficiently high to reimburse themselves for the charges which they paid to the Yard Company. Under such circumstances it was entirely inconsistent with the spirit and intent of the Act to Regulate Commerce for the line-haul carriers to unite with the Yard Company in an evasion of the law by adding to their freight bills, which they knew would be collected from the shipper, the controversial 25 cents per car, and passing on to the shipper the burden of their controversy with the Yard Company. The line-haul carriers in adding the additional 25 cents per car to their freight bills deliberately assumed the responsibility for all of the consequences in so doing.

FREIGHT-BILLS COLLECTED WERE NOT COMPOSITE BILLS, BUT IF THEY WERE IT WOULD MAKE NO DIFFERENCE.

These freight bills were not, as counsel for respondent seek to make it appear, a composite bill showing, respectively, the charges of the line-haul carriers and of the Yard Company. On the contrary, the freight bills purported to represent only charges of the line-haul carriers charged against the commission men. The record shows that the Yard Company had its own separate bill against the commission men for feed and yardage. The fact that in some instances the freight bills stated that the additional 25 cents per car was added because of increase in charges of the Yard Company did not make the extra charge of 25 cents per car any less a charge of the line-haul carriers than any other charges therein contained. All charges, including the extra 25 cents per car, in the freight bills purported to be the line-haul carriers' charges against the consignees named in the shipments involved. But if said freight bills may be said to have been composite bills, what difference can that make in this case? The exaction of the extra 25 cents per car, without lawful authority contained in published tariffs, was unlawful under the particular facts and circumstances in this case, regardless of the construction which may be given such freight bills.

Under this subdivision counsel for respondent Director General again insist that the line-haul carriers, in paying the charges of the Yard Company, were obliged to abide by their tariff provisions and could not increase their absorptions without amending their tariffs. As we have heretofore pointed out, this contention seeks to obscure the real question involved, viz.: *Was the exaction of the extra 25 cents per car from the commission men justified?*

X.

THE CONTENTION OF RESPONDENT DIRECTOR GENERAL THAT PETITIONERS HAD NO RIGHT TO MAINTAIN THIS ACTION HAS BEEN ANTICIPATED AND ANSWERED IN PETITIONERS' BRIEF ON THE MERITS, PAGES 75 TO 96.

Nothing new has been presented on this question in the brief of respondent Director General. In the main we are content to rest the decision of this case on the very able brief filed in this cause on behalf of the Interstate Commerce Commission as *amicus curiae* and on what we have already stated, at pages 75 to 96, of petitioners' brief on the merits. Counsel for the Director General, after devoting 33 pages of their brief in an effort to show that petitioners had no right to maintain this action, strenuously insist that the question is not involved. If the point made by respondents that petitioners had no right to maintain this suit was well taken, it would be decisive of the entire case.

It would seem that if the point upon which the District Court disposed of this case still remains in the case, so that it may be made the basis for affirming the judgment of the Circuit Court of Appeals, it is in the case for any and all purposes.

There are two minor matters in this subdivision of respondent's brief to which we desire to call the attention of this Honorable Court. On page 120 they say:

> "Throughout a good portion of that brief it is assumed that the plaintiffs were awarded reparation 'as factors', but as we have shown, this is not a fact. The plaintiffs were awarded reparation in their own right, and, therefore, a discussion of their right to maintain this suit in the representative capacity as factors is not in issue."

Here again counsel for respondent mis-state the facts.

The complaint filed in No. 12614 (R. 149) specifically states that the 103 plaintiffs in this case are entitled to reparation "as factors and agents on behalf of the owners, consignors and consignees of the shipments to and from the stock yards out of which said contested loading and unloading charges arose." The Commission in its report of June 2, 1925, after making findings showing the relationship between the shipper and the commission men and establishing the right of the latter to enforce reparation in their representative capacity as factors (R. 151), specifically mentions the 103 plaintiffs in this case and finds that they "are severally entitled to reparation as factors and agents for the shippers" (R. 151-152).

ALL ORDERS OF COMMISSION ENTERED IN THIS CASE MUST BE CONSIDERED AND CONSTRUED AS A WHOLE.

It has been repeatedly held by this court that where there are several reports and orders of the Commission with reference to a given matter, such reports and orders must be considered and read together as a whole and so interpreted. (*Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412; *American Express Co.* v. *Caldwell*, 244 U. S. 617, 620, 624.)

The order of December 12, 1927, expressly refers to the report of the Commission entered on February 11, 1919, and the report of the Commission entered on July 15, 1920, and the report of the Commission entered on June 2, 1925, (R. 157) and then states "which reports are hereby referred to and made a part hereof." (R. 158).

Referring to the order of June 2, 1925, (R. 147 to 156) we find the identical complainants mentioned and described in the order of December 12, 1927, named and enumerated in the order of June 2, 1925, and mentioned as being the persons entitled to reparation. The names of the plaintiffs

in this case there enumerated are preceded by the following finding (R. 151):

> "We find the following individuals, copartners, and corporations, parties of record, made the shipments as described in this and our preceding reports and paid the charges thereon, herein and heretofore found to have been unreasonable and unlawful; that they have been damaged in the amount of such charges and are severally entitled to reparation, *as factors and agents for the shippers*, with interest from date of payment."

Construing together as one continuous and complete report all of the reports of the Commission hereinabove referred to and considering the language of said orders in the light of what was actually done by the parties with reference thereto, it is idle and useless to argue that it was the intent and purpose of the order of December 12, 1927, to grant reparation to the complainants in their individual rights for their individual use and benefit. The Commission having in its order of June 2, 1925, found that the plaintiffs, naming them, were entitled to reparation *as factors and agents for the shippers*, it was unnecessary for the Commission in its subsequent order of December 12, 1927, naming the identical plaintiffs which it named in its previous order, to repeat the words "as factors and agents for the shippers." It must necessarily be assumed that the Commission intended to grant reparation to the plaintiffs in the order of December 12, 1927, in exactly the same capacity as that expressly stated in its previous order of June 2, 1925.

But it is said by counsel for the Director General that the petition filed in the District Court to enforce the award of the Commission did not expressly state that it was brought by plaintiffs in their representative capacity. In answer to this we state:

First: That if plaintiffs had the right to maintain the

suit as consignees named in the transportation transaction, then it was not necessary to state in the petition filed in the District Court that they brought said suit in their representative capacity for the use and benefit of the shippers, even though, as a matter of fact, they were so doing.

Second: If they had a right to maintain said suit in the District Court either as factors or as trustees of an express trust, it was not necessary to state that they, in fact, were bringing said suit for the use and benefit of the shippers.

Third: If they had the right to bring this suit in their representative capacity, the petition filed, considered as a whole, shows that the plaintiffs in the District Court were seeking to enforce a right which had been conferred upon them by the Interstate Commerce Commission in their representative capacity, and the petition may therefore be properly construed as being a suit brought by the plaintiffs in their representative capacity for the use and benefit of those for whose benefit the award of the Commission was procured without *expressly* stating that it was brought by them in a representative capacity, since that fact appeared for fair intendment in the petition.

Fourth: The contention urged is highly technical and contrary to the objects and purposes of the Act to Regulate Commerce.

Explanation Made Necessary by Misleading Statements of Respondent.

In the statement contained in the brief or respondent Director General, on pages 14 and 15, it is said, in referring to Docket No. 9977:

> "The Yard Company and Live Stock Exchange filed petitions for rehearing and on April 14, 1919, the proceeding was reopened and in the order so doing the Director General of Railroads was named as a respondent. (R. 237-238)."

Counsel for respondent make no point of this in their argument, but the effect of the statement is to mislead. The record shows (R. 149) that all charges which remain unpaid and which are here involved are covered by complaint in Docket No. 12614. It is therefore wholly immaterial that the Director General of Railroads was named as respondent in No. 9977. Furthermore, it was wholly immaterial whether the Director General was made a party to the complaint in No. 9977, or whether any amendment was ever made so as to make the Director General a party to No. 9977. As a matter of fact he was made a party to Docket No. 9977. (R. 148.)

AWARD OF COMMISSION COVERS SIMILAR CHARGES WHICH HAVE BEEN PAID AND THEREFORE ARE NOT INVOLVED IN THIS CASE.

In this connection an explanation may be pertinent with reference to the shipments and charges covered by the award of December 12, 1927 (R. 157 to 208) and an explanation of the portion of the order of the Commission of June 2, 1925 where (R. 150) claims of Armour & Company and fourteen other Chicago packers are referred to and reparation awarded to them.

The original aggregate amount of the items of reparation covered by the order of the Commission, involved items not included in the sum of $140,001.25, *now remaining unpaid and here involved.* It included in addition thereto reparation in favor of petitioners and against the line-haul carrie individually for the period of time immediately prior to the period of Federal Control. Payment by the line-haul carriers to the plaintiffs of the items in said reparation order arising prior to the period of Federal Control eliminated those items from the amount sought to be recovered by plaintiffs in the District Court.

In the proceedings before the Commission Armour & Company, Wilson & Company, Morris & Company, Swift & Company, and eleven other Chicago packing companies presented their several claims for reparation growing out of the exaction of the disputed charge, not only during the period of Federal Control, but during the period of time immediately antecedent to that period. The Commission in said proceeding granted reparation to said packers (R. 150), who were paid by the Director General and the Stock Yard Company the amount of the reparation awarded to them on account of the collection of the disputed charge during the period of Federal Control. The Chicago packers were also paid by the line-haul carriers as reparation for the payment of the additional 25 cents per car, paid by the packers during the time immediately preceding the period of Federal Control, the full amount of such payments. This accounts for the circumstance that although the Chicago packers were parties to the proceedings before the Interstate Commerce Commission, and there sought and obtained an order of reparation on account of the payment by them of the disputed charges in question, they were not co-plaintiffs with the petitioners in this case in the suit brought in the District Court. It is also in explanation of the statement made by counsel for respondent Union Stock Yard & Transit Company, on page 14 of their brief where it explained that the amounts in said order of reparation (R. 157 to 208), not preceded by the initial "D. G.", are not involved in this suit.

XI.

THE WRIT IN THIS CASE WAS NOT IMPROVIDENTLY GRANTED.

We do not dispute the well established proposition that if this court on hearing the case on its merits concludes that the writ of certiorari by which the case was brought before it was improvidently granted the writ may be dismissed, but this is not such a case.

Regardless of what counsel for respondent have said under this subdivision of their brief, we still insist:

1. That there is squarely raised by the decision of the Circuit Court of Appeals an important question of Federal law which has not been, and should be, settled by this Honorable Court, viz: Where a carrier holds itself out in its published tariffs to transport live stock under through rates and charges for the complete transportation, including the unloading of such live stock, may an extra charge for a part of the unloading service be exacted from the shipper, either by the carrier or its agent, on the basis of a tariff published and filed by the agent of the line-haul carrier increasing its charge for such unloading service, without the line-haul carrier first amending its published tariff of rates and charges purporting to cover the entire service?

2. That there is squarely raised by the decision of the Circuit Court of Appeals the further question which has not been and which should be settled by this Honorable Court, viz: May a common carrier engaged solely in the rendering of a terminal service to another line-haul carrier as its agent, lawfully file its tariffs of rates and charges as to make the same applicable only to the carrier for whom it is performing such service as agent?

3. That there is squarely raised by the decision of the

Circuit Court of Appeals the further question which has not been and which should be settled by this Honorable Court, viz: Does an absorption clause in the published tariffs of the line-haul carriers, to the effect that it will absorb and pay a certain portion of a terminal charge, such as the unloading of live stock, control and prevail over other portions of such published tariffs which undertake the performance of the entire transportation transaction including such unloading in consideration of the payment by the shipper of a fixed commodity charge plus a fixed terminal charge?

4. That the action of the Circuit Court of Appeals in ignoring in its decision the finding of the Commission that "the line-haul rates to Chicago, plus a charge of $2.00 for terminal or switching service, have for years constituted the through charge and included delivery of live stock to the consignee at the stock yards" (R. 144), and in substituting its judgment for that of the Commission in holding that the classifications of the line-haul carriers were controlling over the line-haul rates and said $2.00 terminal charge, was a clear departure from the accepted and usual course of judicial proceedings and from the rule well established by this court to the effect that where tariffs filed require consideration of matters of fact and application of expert knowledge for the ascertainment of the technical meaning of the rules and a correct appreciation of a variety of incidents affecting their use, the determination of the meaning of such tariffs calls for the exercise of the trained judgment of that body of experts appointed by law and informed by experience, namely, the Interstate Commerce Commission; that in such case the courts will respect and accept the finding of the Interstate Commerce Commission as to the meaning, force and effect of such tariffs. (*Standard Oil Co.* v. *United States*, 283 U. S. 235; *Illinois Central R. R.* v. *Interstate Commerce Commission*, 206 U. S. 441, at

454; *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U. S. 285.)

5. That the action of the Circuit Court of Appeals in refusing to respect and accept the finding of fact by the Interstate Commerce Commission that it was the duty of the carriers to unload live stock consigned over the lines of the line-haul carriers to the Union Stock Yards at Chicago, and in substituting its judgment for that of the Commission on that subject, and holding (R. 397-398) that it was the duty of the shipper to unload his own live stock at the Union Stock Yards, or to directly pay respondent Union Stock Yard & Transit Company for performing such service a charge in addition to the amount set up in the line-haul rates and in the $2.00 terminal charge of the line-haul carriers covering said service, was a departure from the accepted and usual procedure of the courts in this kind of a case and directly contrary to the views expressed by this court in *United States* v. *Union Stock Yards*, 226 U. S. 286, *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, *Interstate Commerce Commission* v. *Union Pacific R. R. Co.* 222 U. S. 541, and *Illinois Central R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441.

6. (a) That the action of the Circuit Court of Appeals in affirming the judgment of the District Court has sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings in a case of this kind; by the affirmation of the judgment of the District Court the published opinion in that case has the effect of law and precedent.

(b) That the rule so announced by the District Court and sanctioned by the Circuit Court of Appeals is also directly contrary to the decisions of other District Courts, namely *Arcadia Mills* v. *Carolina C. & O. Ry.*, 293 Fed. 639; *Merchants & Manufacturers Traffic Ass'n* v. *United States*, 231

Fed. 292; *Consolidated Cut Stone Co.* v. *Atchison, T. & S. F. Ry. Co.*, 39 Fed. (2d) 661.

Conclusion.

We again respectfully submit that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit and the judgment of the District Court be reversed and the cause remanded to the District Court with such directions as this court may deem appropriate.

Respectfully submitted,

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